122-627
(2)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~[illegible] 8444 484~~ 204.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA EX REL. HENRY SHEPHERD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED MARCH 17, 1883.

SUPREME COURT OF THE UNITED STATES.

No. 1229.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA EX REL. HENRY SHEPHERD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 UNITED STATES OF AMERICA, *ss:*

Circuit court of the United States, fifth circuit, eastern district of Louisiana.

STATE OF LOUISIANA, ON THE RELATION OF Henry Shepherd,
vs.
CITY OF NEW ORLEANS. } No. 10103.

TRANSCRIPT OF RECORD OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.—FILED DECEMBER 16TH, '82.

STATE OF LOUISIANA:

Civil district court for the parish of Orleans.

STATE, EX REL. HENRY SHEPHERD,
vs.
CITY OF NEW ORLEANS. } No. 7271.

Petition for mandamus.—Filed December 14th, '82.

To the honorable the civil district court for the parish of Orleans:

The petition of the State of Louisiana, in relation of Henry Shep-
2 herd, a citizen of the State of West Virginia, temporarily residing in the city of New Orleans, respectfully represents:

That in the year of our Lord 1852, during its regular session, the general assembly of the State of Louisiana passed "An act to consolidate the city of New Orleans and provide for the gover'ment and administration of its affairs," approved February 23d, 1852, and *from* promulgated as act No. 71, the thirty-seventh section whereof reads as follows, viz: Sec. 37. "Be it enacted, etc., That the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities, whether in the form of bonds, notes, interest coupons, cash, warrants, or any other species of obligations whatever, shall be assumed and paid by the city of New Orleans, and said city is hereby declared liable therefor. The mayor, comptroller, and treasurer, and the chairman of the finance committees of the two boards of the common council shall constitute a commission, to be called the commissioners of the
3 consolidated debt of New Orleans, and they shall have power to issue bonds of the city of New Orleans, having not more than forty years to run, with interest, payable at such place as may be agreed on between said commissioners and the parties to whom the bonds are issued in semi-annual coupons in exchange for any bonds, obligations, or debts of the old corporation, or of any of the municipalities, whether matured or not, or to sell the new bonds and apply the proceeds to the payment of the matured debts of the old corporation or of the municipalities, but to no other purpose. The bonds thus issued shall form a stock, to be called the consolidated debt of New Orleans. At the time this act goes into operation an exact and detailed statement of the indebtedness of the old corporation

and of each municipality shall be filed in the office of the comptroller by the secretary of the Board of Liquidators and the municipal comptroller respectively, when the commissioners of the consolidated debt
4 shall proceed to divide the debt of the old corporation between the several municipalities in proportion to the assessed value of real estate within the limits of each, according to the State assessment roll for 1851. The amount thus apportioned to each, together with its individual indebtedness at the time this act goes into operation, shall constitute the separate debt of each municipality, No. one, No. two, No. three. The common council shall, annually, in the month of January, pass an ordinance to raise the sum of six hundred thousand dollars by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent. of said tax in each municipality shall be in proportion to the indebtedness of each. All the ordinances, resolutions, or other acts passed by said council after the first day of January in each year shall be null and void unless the ordinance imposing the consolidation loan tax shall have been
5 previously passed at the end of each and every year. Any surplus of the consolidated loan tax remaining in the treasury after the payment of all the interest and the expenses of the management of said debt shall be applied to the purchase from the lowest bidder of such bonds issued under this act as have the shortest period to run; and the common council shall have the right of rejecting all bids demanding more than the face of the bonds, for which purpose public notice shall be given by the comptroller in the Official Gazette for thirty days, inviting proposals from bondholders for the sale to the city of the bonds herein described. From and after the passage of this act no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the city of New Orleans or under its authority, nor shall any loan be contracted unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken
6 in the manner prescribed by the city council, after ten days' proclamation by the mayor in the newspaper chosen by the common council; and no ordinance creating a debt or loan shall be valid unless such ordinance shall prescribe ways and means for the punctual discharge at maturity of the capital borrowed or debt incurred, and such ordinance shall not be repealed until the principal and interest of the capital borrowed or the debt incurred are fully paid and discharged."

That in the same year the said general assembly passed an act supplementary to the act just mentioned, which was approved on February 23d, 1852, and promulgated as No. 72, the fifth section whereof reads as follows, viz:

"SEC. 5. Be it further enacted, etc., That the debt of the city of Lafayette shall be assumed and paid by the city of New Orleans, and the said city of New Orleans is hereby declared liable therefor, and the amount of said debt shall be ascertained and its payment provided for and
7 made in the same manner as the debt of each municipality of New Orleans is ascertained and provided for in the act to which this act is a supplement; and in raising annually the consolidation loan tax for the payment of the debt of New Orleans an additional sum of fifty thousand dollars shall be raised for the purposes of providing for the debt of the city of Lafayette, now added to that of New Orleans, so that the whole

amount of the annual levy of taxes for the payment of the debt of New Orleans shall be six hundred and fifty thousand dollars."

That in furtherance of said section 37, as amended by said section 5 of the general assembly, the City of New Orleans, a municipal corporation created by charter from the general assembly of said State, established and existing within said State, has issued bonds according to the tenor of said law, for some ten millions of dollars, in exchange of the bonds, obligations, or debts of the three municipalities in existence at the
8 time of the adoption of *of* said acts for which said City of New Orleans was liable, and that all the bonds so issued by said city were used for the purposes contemplated by said acts.

That by the provision of said section 37, as amended, the common council of said city was commanded annually, in the month of January, to pass an ordinance to raise the sum of six hundred and fifty thousand dollars by a special tax on real estate, to be called the consolidated loan tax, to be applied first to the payment of all the interest of said bonds, and any surplus to the purchase from the lowest bidder of such bonds as have the shortest period to run; and it was provided by said law that all ordinances, resolutions, or other acts passed by said council after the first day of January in each year shall be null and void unless the ordinance imposing the consolidated loan tax were previously passed.

9 That of the bonds so issued by said city more than five millions have been retired, and there are outstanding of bonds so issued more than four millions, the interest coupons of which maturing since the year 1875 are unpaid, with the exception of *sa*me portion thereof on which judgments have been rendered by the circuit court of the United States for the eastern district of Louisiana, which judgments are now in process of collection.

That of said outstanding bonds, together with coupons matured in said year, and all subsequent coupons up to the maturity of said bonds, payable semi-annually, and each for $30.00, relator holds one hundred and eighteen, a list of which is hereto attached; and your relator also holds *a*n account of other parties, and represent those parties in this proceeding, about nine hundred of said bonds, making in the aggregate a million of dollars. That in violation of the provisions of said section 37 of said act of 1852 the legislature of the State of Louisiana, on the 12th of March, 1874, passed an act entitled "An act to postpone the levy and col-
10 lection by the city of New Orleans of a tax for a sinking fund for the purpose of purchasing any of the bonds issued under the provisions of said section 37 of said act of 1852."

That the said legislature, in further violation of said section 37 of said act of 1852, on the 6th of March, 1876, passed an act entitled "An act to adjust, regulate, and provide for the bonded debt of the city of New Orleans," known as the premium-bond act, prohibiting the said city from levying any tax for any year under the provisions of said section 37 of said act of 1852, and repealing all laws authorizing the city to levy any tax whatsoever for bonds or interest on bonds other than the said premium bonds.

That on the 29th December, 1877, the Southern Bank, a holder of some of said bonds issued under the provisions of section 37 of said act of 1852, filed proceedings in the then 3rd district court for the parish of

Orleans for a mandamus to compel the then administrators of the
11 city of New Orleans to levy the *the* tax provided for under said section 37 of said act of 1852, and to collect and apply the same according to the provisions of said act. That a final judgment has been rendered in that case by the Supreme Court of the United States, ordering the mandamus prayed for to be made peremptory, and directing the city of New Orleans to raise by taxation the sum of six hundred and fifty thousand dollars, to be applied according to the provisions of said section 37 of said act of 1852. That said Southern Bank represented the interest of all of the bondholders holding bonds issued under said section 37 of said act of 1852, and the judgment therein rendered is res judicata against the City of New Orleans in favor of any and all holders of said bonds.

That the legislature of the State of Louisiana in the year 1882 passed two acts, one being No. 58, approved June 30, 1882, and the other being No. 68, approved July 1st, 1882, the said two acts being alternative acts, one to go into effect in case the other should be rejected by those for
12 whose benefit it was passed, in both of which acts provision is made in the one for renewing the bonded debt of the city other than the premium bonds, or in the other providing for the payment of the interest only on said bonded debt. The rate of tax provided for in either act is entirely inadequate to carrying out the provisions of the said section 37 of said act of 1852, and in fact constitute a refusal on the part of the legislature to authorize the city to comply with the judgment rendered by the Supreme Court of the United States aforesaid.

That the city of New Orleans and the State of Louisiana have, through their acts and their legislation, again and again refused to carry into effect the provisions of said section 37 of said act of 1852, although the said city has been called on so to do, not only by said Southern Bank in the year of 1876, but since then by your relator and other parties in interest. That said acts approved 12th of March, 1874, said premium-bond act, and said two acts passed in the year 1882 are in conflict with the Con-
13 stitution of the United States, as divesting the vested rights of relator under said act of 1852, and have impaired the obligation of the contract of relator with said State and city. That on the 16th of March, 1870, the legislature of the State of Louisiana passed act No. 7, entitled "An act to extend the limits of the parish of Orleans," &c., in which it is specially provided that the debt generally known as the consolidated city debt, existing under the provisions of said section 37 of said act of 1852, shall be assumed and paid by the city of New Orleans as incorporated by said act. That on the 23d of March, 1874, the legislature of the State of Louisiana passed act No. 71 of that year, entitled "An act to annex the city of Carollton to the city of New Orleans," etc., whereby the then city of Carollton was annexed to and merged in the city of New Orleans, and the said city of New Orleans was charged with the debt of the said city of Carollton.

That on the 23d of June, 1882, the legislature of the State of Louisiana, by act No. 20 of that year, passed an actentitled "An act to
14 incorporate the city of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all act' inconsistent and in conflict with its provisions," whereby a change of form of government of the said city of New Orleans was effected, the same

being vested in a mayor and council, the territorial limits of the said city remaining unchanged.

That the said city of New Orleans and the taxable property within its limits are liable for the payment of the coupons of said bonds which have matured, and for the purchase of said bonds to the extent of six hundred and fifty thousand dollars per annum, and should be compelled by the process of this court to *buy*, collect, and apply the said special tax for the years 1882 and 1883, and for each subsequent year until the said bonds are extinguished.

That the said city of New Orleans is estopped from denying her obligation by the judgment of the Supreme Court of the United States aforesaid rendered in the case of the Southern Bank.

15 That the city of New Orleans, through its council, has made no provision whatever for the payment of the past-due coupons attached to the bonds held by your relator for the year 1882 and previous years, and your relator is entitled to have the tax provided and required by the 37' section of the act of 1852 assessed, levied, and collected to pay and extinguish the coupons remaining due and unpaid, and to provide for those maturing, and to raise the sinking fund for the purchase of bond' without further delay.

The premises considered, relator prays that a writ of mandamus be issued herein commanding the city of New Orleans, through its mayor, William J. Behan, and the members composing the council of said city, at once to levy by separate and distinct assessments, and hereafter collect and apply under the provisions of section 37, act No. 71, approved the 23d of February, 1852, a special tax of six hundred and fifty thousand dollars for the year 1882 to meet the coupons overdue and unpaid, and to purchase bonds issued under said section by the city, as well as

16 a similar tax for the year 1883 and each subsequent year, for the purpose of paying the coupons maturing during the year, and purchasing and retiring bonds, as contemplated by said section 37, and in conformity with the decree of the U. S. Supreme Court rendered in the aforesaid suit of The State, ex rel. Southern Bank, vs. Edward Pillsbury, mayor, et als. And your relator prays that said mandamus be made peremptory, and for such other and further relief in the premises as the nature of the case may require.

(Signed) THOS. SEMMES,
" E. HOWARD McCALEB,
Att'ys for Relator.

Affidavit.

Henry Shepherd, being duly sworn, says that all the facts and allegations contained in the foregoing petition are true and correct.

(Signed) HENRY SHEPHERD.

Sworn to and subscribed before me this 14th day of December, A.D. 1882.

(Signed) T. WHARTON COLLINS,
Not. Public.

17 *Document annexed to petition.—Filed December 14th*, 1882.

Memorandum of city consolidated bonds.

Crossman, No.	305	July	&	Jan'y.
" "	302	"	&	"
" "	268	"	&	"
" "	272	"	&	"
" "	303	"	&	"
" "	270	"	&	"
" "	903	"	&	"
" "	2361	"	&	"
" "	2354	"	&	"
" "	4369	"	&	"
" "	4874	"	&	"
" "	4129	"	&	"
" "	1368	"	&	"
" "	1369	"	&	"
" "	2358	"	&	"
" "	4367	"	&	"
" "	2362	"	&	"
" "	4370	"	&	"
" "	2265	"	&	"
" "	5634	"	&	"
" "	5254	"	&	"
" "	5357	"	&	"
" "	5538	"	&	"
" "	5543	"	&	"
" "	5358	"	&	"
" "	5542	"	&	"
" "	5665	"	&	"

18 Memorandum of city consolidated bonds.

Crossman, 28, No.	5666	July	&	Jan'y.
" "	5636	"	&	"
" "	5664	"	&	"
" "	5392	"	&	"
" "	5360	"	&	"
" "	5255	"	&	"
" "	57	"	&	"
" "	4640	"	&	"
" "	902	"	&	"
" "	2944	"	&	"
" "	2937	"	&	"
" "	4499	"	&	"
" "	4468	"	&	"
" "	292	"	&	"
" "	4307	"	&	"
" "	2757	"	&	"
" "	2758	"	&	"
" "	2755	"	&	"

	"	"	925	"	& "
	"	"	3994	"	& "
	"	"	5203	"	& "
	"	"	4786	"	& "
	"	"	3995	"	& "
$\frac{22}{50}$	Hoyt,	"	8	F'br'y	& Aug.
	"	"	6	"	& "
	"	"	4	"	& "
	"	"	3	"	& "
	"	"	2	"	& "
	"	"	16	"	& "

19 Memorandum of city consolidated bonds.

$\frac{22}{50}$	Hoyt,	No.	19	Febr'y	& Aug't.
	"	"	21	"	"
	"	"	24	"	"
	"	"	25	"	"
	"	"	26	"	"
	"	"	28	"	"
	"	"	39	"	"
	"	"	40	"	"
15	"	"	55	"	"
65	Crossman,	No.	27	Jan'y	& July.
	"	"	28	"	"
	"	"	29	"	"
	"	"	30	"	"
	"	"	250	"	"
	"	"	251	"	"
	"	"	252	"	"
	"	"	253	"	"
	"	"	293	"	"
	"	"	294	"	"
	"	"	507	"	"
	"	"	509	"	"
	"	"	893	"	"
	"	"	895	"	"
	"	"	894	"	"
	"	"	896	"	"
	"	"	897	"	"
	"	"	898	"	"
	"		3408	"	"
	"		3409	"	"

20 Memorandum of city consolidated bonds.

Crossman,		No.	3410	Jan'y	& July.
	"	"	3411	"	"
	"	"	3412	"	"
	"	"	3414	"	"
	"	"	3415	"	"
	"	"	3416	"	"

"	"	3417	"	"
"	"	3334	"	"
"	"	3335	"	"
"	"	3336	"	"
"	"	3437	"	"
"	"	3438	"	"
"	"	3440	"	"
"	"	3773	"	"
"	"	4304	"	"
"	"	4305	"	"
"	"	4306	"	"
"	"	4760	"	"
"	"	5220	"	"
"	"	3407	"	"
"	"	3406	"	"
"	"	3405	"	"
"	"	3404	"	"
"	"	3403	"	"
"	"	3402	"	"
"	"	3401	"	"
"	"	3433	"	"
"	"	2754	"	"
		1791		

21 Memorandum of city consolidated bonds.

Crossman No.	904	Jan'y	& July.
" "	701	"	& "
53 188 " "	899	"	& "

Total, 118 bonds ..... 15 Hoyt, Feb'y & Aug't.
103 Crossman, Jan'y & July.

Order.

Let an alternative writ of mandamus issue herein, as prayed for and according to law, returnable on Friday the 22' day of December, 1882, at 11 o'clock a. m.

New Orleans, December 14th, 1882.

(Signed) HENRY L. LAZARUS, *Judge.*

Writ of mandamus.

STATE OF LOUISIANA:

Civil district court of the parish of Orleans.

The State of Louisiana to the city of New Orleans, through its mayor, William J. Behan, and the members composing the city council, greeting:

STATE, EX REL. HENRY SHEPHERD, *vs.* CITY OF NEW ORLEANS. } No. 7271.

22 You are hereby commanded in the name of the State of Louisiana and of the civil district court for the parish of Orleans to comply with

the demand of the relator herein, as contained in the petition, a copy of which accompanies this writ and is made a part hereof, or show cause to the contrary on Friday, the 22d day of December, 1882, at 11 o'clock a. m.

Witness the honorable A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, Henry L. Lazarus, judges of our said court, this 14th day of December, in the year of our Lord one thousand eight hundred and eighty-two, and in the 107th year of the Independence of the United States.

(Signed) JAS. D. RANKIN, *D'y Cl'k.*

Sheriff's return.

Rec'd Dec. 14, 1882. And on the 15th day of December, 1882, I served a copy of the within writ of mandamus & accompanying petition on the City of New Orleans & the members composing the city council New Orleans, through W. J. Behan, its mayor, in person.

Returned same day.

(Signed) JNO. E. JEIKFOOT,
D'y Sh'ff.

23 *Petition for removal.—Filed December* 15, 1882.

C. d. ct., parish of Orleans.

STATE LA., EX REL. HENRY SHEPHERD,
vs.
CITY OF NEW ORLEANS. } No. 7271.

Petition for removal to the circuit court of the United States for the eastern district of Louisiana.

Your petitioner, Henry Shepherd, relator herein, respectfully shows that the matter and amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum of five hundred dollars.

That relator's right to a tax as prayed for in his petition for a mandamus is a vested right resting upon a contract between the city of New Orleans & your petitioner, and is supported & sustained by the Constitution of the United States, and that this cause is one arising under the Constitution & laws of the United States. That the controversy in said suit is between a citizen of the State of West Virginia and a corporation created under and domiciled in the State of Louisiana; that your petitioner
24 was at the time of the commencement of this suit, and still is, a citizen of the State of West Virginia, & that the City of New Orleans, defendant herein, is a corporation created by the laws of Louisiana, & is a citizen of said State. And your petitioners offers herewith a bond with good and solvent surety for his entering in the said circuit court of the United States on the first day of its next session a copy of the record in this suit, & for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully and improperly removed thereto.

And he prays this honorable to proceed no further herein except to make the order of removal required by law and to accept the said surety & bond & to cause the record herein to remove into said circuit court of

the United States in and for the eastern district of Louisiana, & they will ever pray.

(Signed) T. J. SEMMES & PAYNE,
E. HOWARD McCALEB,
Att'ys for Petitioner.

25 *Order for removal.*

Let the accompanying bond for the sum of five hundred dollars, furnished by the relator herein and according to law, be accepted, and let this cause be removed to the circuit court of the United States in and for the eastern district of Louisiana, sitting in New Orleans.

New Orleans, December 15th, 1882.

(Signed) F. A. MONROE, *Judge.*

Bond for removal.—Filed December 15th, 1882.

Know all men by these presents that I, Henry Shepherd, as principal, and R. D. Shepherd, as sureties, are held and firmly bound unto the City of New Orleans in the penal sum of five hundred ($500) dollars, for the payment whereof, well and truly to be made, unto the said City of New Orleans, its representatives, successors, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions, the said Henry Shepherd having pe-
26 titioned the civil district court in and for the parish of Orleans, State of Louisiana, for the removal of a certain cause therein pending, wherein the State of Louisiana, ex rel. Henry Shepherd, is plaintiff and the City of New Orleans defendant, to the circuit court of the United States in and for the fifth circuit, eastern district of Louisiana:

Now if the said Henry Shepherd, your petitioner, shall enter in the said circuit court of the United States on or before the 1st day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 15th day of December, A. D. 1882.

(Signed) H. SHEPHERD. [SEAL.]
" R. D. SHEPHERD. [SEAL.]

27 *Certificate.*

STATE OF LOUISIANA:

Civil district court for the parish of Orleans.

I, E. A. Luminais, deputy clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing twenty-seven pages do contain a true, correct, and complete transcript of all the proceedings had, document' filed, and evidence adduced upon the trial of the cause wherein

Henry Shepherd is plaintiff and the City of New Orleans is defendant, instituted in this court and now in the records thereof under the No. 7271.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, and in the one hundred & seventh year of the Independence of the United States of America.

[SEAL.] (Signed) E. A. LUMINAIS,
Dy Clerk.

28 *Order fixing rule nisi issued by the State court for hearing.—Extract from the minutes Dec. 16, 1882.*

STATE OF LOUISIANA, ON THE RELATION OF Henry Shepherd, *vs.* CITY OF NEW ORLEANS. } No. 10103.

On motion of T. J. Semmes & Payne and E. Howard McCaleb, counsel for relator, and on suggesting to the court that prior to the removal of the above-entitled cause to this court an alternative writ of mandamus had issued and had been served upon defendant, returnable on the 22d day of December, 1882, at 11 o'clock a. m., under an order issued by the civil district court for the parish of Orleans; it is ordered that defendant, through the Hon. Wm. J. Behan, mayor of the city of New Orleans, be notified that the record in this cause, removed from the civil district court for the parish of Orleans, has been entered in this court and filed with the clerk, and that the hearing of the rule nisi herein issued by the
29 State is, in accordance with the order thereof, fixed for trial on Friday next, December 22d, 1882, before this court, at 11 o'clock a. m.

Marshal's return.

Received Dec. 16, 1882, by the U. S. marshal, and on the same day, month, and year I served a true copy of the within notice of trial on the City of New Orleans, defendant herein, by handing a copy of the same to Wm. J. Behan, mayor of the said city of New Orleans, in person, at his office in the city hall, New Orleans, La., Dec. 20th, 1882.

(Signed) THOMAS J. BOSWELL,
Dy U. S. Marshall.

Peremptory exception.—Filed Dec. 22d, 1882.

STATE OF LA., EX REL. HENRY SHEPHERD, *vs.* CITY OF NEW ORLEANS. } No. 10103.

To the hon. the circuit court of the United States for the fifth circuit and eastern district of La.:

30 And now for the purposes of this exception only, and reserving the objection made to the ruling of the court ordering the filing of

return on this day, to which ruling a bill of exception has been allowed, appears the defendant and for peremptory exception pleads that this honorable court is without jurisdiction herein ratione materiæ; that the petition and order for removal from the State court of La. are illegal and unauthorized and conferred no jurisdiction on this hon. court; that this court is utterly without power to issue the writ of mandamus against civil officers of the State or within the State to compel the performance of any specific duty, and has no power to issue the writ except, if at all, in aid of the exercise of a jurisdiction previously acquired or in execution of judgments previously obtained.

Wherefore she prays that this exception be maintained, and this cause remanded to the State court, with costs, etc.

(Signed) C. F. BUCK, *City Att'y.*
(Signed) WYNNE ROGERS,
Of Counsel.

31 *Exception and answer.—Filed Dec.* 22, 1882.

To the hon. circuit court of the United States, fifth circuit and eastern dist. of Louisiana:

STATE, EX REL. HENRY SHEPHERD, *vs.* CITY OF NEW ORLEANS. } No. 10103.

The defendant herein, appearing through undersigned counsel, reserving the objection to the filing of this return at this time and the exception now filed to the jurisdiction of this court, for further exception and answer to relator's petition pleads:

1st. That said petition discloses no cause of action.

2d. That the decree in the case of State, ex rel. Southern Bank, vs. Pilsbury, mayor, et als., recited in relator's petition, is res adjudicata between all holders of consolidated bonds and the City of New Orleans as to the matters set up in relator's petition.

And for answer respondent denies the allegations in relator's petition contained, and specially that he is a citizen of the State of West
32 Virginia. And respondent avers that he is informed and has reason to believe, and so avers, that he is a citizen of the State of La.

Respondent, further answering, denies specially that relator is owner of the bonds described in the petition, and denies his authority and right to institute these proceedings in the name or for the benefit of persons whom he claims to represent, but whose names he fails to disclose.

Further answering, respondent avers that in order to enable the City of New Orleans to pay all valid indebtedness and meet all legal obligations the legislature of the State of La., in acts No. 58 and 68 of the session of 1882, made part of this return, authorized her to levy and collect annually a tax of 5 mills in addition to the 5 mills tax for redemption payment of debt provided by act 31 of the acts of 1876. Respondent avers that she intends to levy and collect said tax according to the terms of said acts, apply the proceeds as directed.

That the said tax will yield on a probable assessment of $115,-
33 000,000, after allowing more than 10 % for delinquencies, at least

$1,000,000, which will be ample and sufficient to meet all accruing and just demands of relator in the future; that after allowing to the premium bonds their full requirement, which will not be largely in excess of $300,000, there will be left a sum of about $700,000 to be applied to the payment of interest on bonds other than premium bonds, the surplus to be applied first as a sinking fund for the retirement of "consolidated bonds."

Avers that the consolidated bonds outstanding aggregate about the sum of $4,300,000; that bonds other than "consolidated" and premium bonds aggregate about, but probably less than, $1,500,000, and the past-due coupons, to be funded into 6 % bearing certificates, amount to about $1,000,000, making a total interest-bearing bonded debt—except premium bonds—of $6,800,000, $5,300,000 bearing 6 and $1,500,000 7 % interest, amounting annually to the sum of $423,000 and no more. Re-
34 spondent, therefore, avers again that said 1 % tax will yield a sufficient revenue to meet all accruing interest and leave a surplus, which, under the terms of the act No. 68, must be applied to the purchase of outstanding bonds.

And respondent avers that relator has no other or greater right in the premises than to demand payment of the interest accruing on his bonds; that the provisions of law for redemption of said bonds are not an irrepealable part of the contract; that same may be changed, modified, or repealed without necessarily impairing the obligation of the contract; that until the maturity of said bonds, as a holder cannot be compelled to surrender same, the city's duty of redemption is optional, and becomes final and absolute only when said bonds mature.

That it is always in the power of the legislature to authorize the payment, renewal, or extinction of bonds, as policy or circumstances may sug-
gest, in a manner different from that prescribed in the original act
35 authorizing the issue of such bonds, and the holders of such bonds have no right or authority to impede the execution of such laws, and cannot complain so long as their accruing and matured claims for interest are satisfied.

Respondent shows that though relator may be unwilling to accept the extension and renewal of his bonds tendered by act 58, that there is ample provision & authority in the laws for the city to provide the necessary revenue to pay the interest on relator's bonds becoming due in the year 1883; that the city authorities must be presumed to intend obedience to the law, and the application for a mandamus to perform a duty is premature if the time for the discharge thereof has not arrived and nothing has happened to warrant an assumption that the duty will not be performed.

That as matter of fact, in the projet for the budget of expenditures and liabilities for the year 1883 the city council has set apart for interest and
redemption of public debt the total proceeds of the 1 % tax on
36 assessed valuation of taxable property, amounting to the sum of $1,115,000, which appropriation embraces all just demands of relator, and if the extension and renewal of the bonded debt of the city is not accomplished, will in terms satisfy all the conditions of relator's contract as to payment of interest and redemption of his bonds, as will more fully appear by reference to sections I and II of act No. 68, acts of 1882, specially made part hereof.

Wherefore respondent prays that relator's suit be dismissed, and the mandamus refused, with costs, and for general relief, &c.

(Signed) C. F. BUCK,
City Attorney.

The undersigned, duly sworn, deposes and says that to the best of his knowledge and belief the facts and allegations in this answer contained are true and correct.

(Signed) W. J. BEHAN, *Mayor.*

Subscribed and sworn to before me Dec. 22, 1882.

(Signed) F. A. WOOLFLEY.
Comm'r U. S. Circuit Court.

37 And in addition to the foregoing, for further answer and return, and as part thereof, respondent avers that a large number of holders of bonds of the class described by relator have been extended and renewed in accordance with the terms of act No. 58 of the acts of 1882, and the debt settlement therein proposed is being genenally accepted; and if relator is entitled to any relief, it is to the extent and in proportion of the bonds owned or represented by him only. And she prays as above.

(Signed) C. F. BUCK,
City Att'y.

Petition of intervention of J. B. Woods et als.—Filed by leave of court, Dec. 2d, 1882.

U. S. circuit court, eastern dist. of La.

STATE OF LA., EX REL. HENRY SHEPHERD,
vs.
THE CITY OF N. ORLEANS. } No. 10103.

To the honorable the judges of the U. S. circuit court for the eastern district of Louisiana:

The petition of intervention of Jas. B. Woods, Mrs. Catharine
38 G. Southmayd, Columbus H. Allen, Rich'd H. Crawford, Matilda McCrae (wife of F. R. Southmayd, and herein authorized by her said husband), Scott McGehee, Burris D. Wood, B. O. L. Rayne, Thos. Sefton, Jno. J. Gidiere, J. Born, Augustus Rice, and of F. R. Southmayd, who herein appears to assist his said wife, by leave of court filed, respectfully represents:

That they are severally citizens of the State of Louisiana, residents and owners of real and personal property situated in the city of Jefferson, now designated as the sixth district of the city of New Orleans.

That relator in the above-entitled suit has petitioned for and obtained an alternative writ of mandamus against the City of New Orleans, commanding the said city, through its mayor, William J. Behan, and the members composing the council of said city, at once to levy, by separate and distinct assessments, and hereafter collect and apply, under the provisions of section 37 of act No. 71 of the State legislature of 1852, and sec. 5

of act No. 72 of the same legislature, a special tax of $650,000.00 for
39 the year 1882 to meet the coupons overdue and unpaid, and to purchase bonds issued under said section by the city, as well as a similar tax for the year 1883, and in each subsequent year thereafter, for the purpose of paying the coupons maturing during the year and purchasing and retiring bonds, as contemplated by said sec. 37, until the principal and interest of the debt created by said acts is paid and extinguished, or show cause to the contrary on Friday, the 22d December instant.

Intervenors further represent that the said acts, Nos. 71 and 72, of 1852, upon which relator herein rests his right for a writ of mandamus against the City of New Orleans, and especially sections 36 and 37 of the former, and sections 5 and 6 of the latter acts, constitute a contract entered into between the holders of bonds issued in conformity with the provisions of said acts, and the City of New Orleans, as incorporated thereby; that relator is bound by the terms of said contract, and has no other
40 rights as a holder of bonds issued thereunder than those expressed and defined in the said acts, by which alone the said bonds have any validity; that the said acts specify, define, and limit the boundaries of the districts within which was situate the property subject to the provisions of said contract; that, further, the said acts limit the amount of tax to be levied thereunder annually, and define and limit the nature and kind of property upon which said tax is to be levied, which property is alone liable for the assessment and tax prayed for by relator.

Intervenors further represent that neither the real estate situate in the said sixth district of New Orleans nor the personal property of persons residing in said district are subject to the provisions of the said contract. They had no voice therein; neither they nor their said property (real and personal) have ever received any benefit from the tax levied under said acts; nor can they or their property receive any benefit or compensation from the assessment and tax prayed for by relator, and to assess and
41 to tax their property as prayed for by said relator would be in violation of intervenor's rights in violation of the constitution of Louisiana, and especially article 156 thereof; in violation of the Constitution of the United States, and especially the 5th amendment thereof, and an irreparable injury to your intervenors.

Intervenors allege that, though it may be true (which, however, is not admitted by them), as alleged by relator, that by the act No. 7 of 1870, approved March 16th of said year, the said property, intervenors was made subject to the provisions of the contract made under said acts Nos. 71 & 72 of 1852, yet intervenors aver that the said act No. 7 was in direct violation of the then constitution of the State of Louisiana of 1868, and especially of articles 83 and 110 of said constitution; is in violation of the constitution of Louisiana, and especially articles 155 and 156; and, so far as the same seeks to hold the real estate situate in the said sixth
42 district of the city of New Orleans, or the personal property of persons residing in said district, and especially the said real and and personal property of your intervenors liable for the tax now sought by the relator to be levied under his writ of mandamus, is in violation of the Constitution of the United States, and especially section 10 of article 1 and amendment V of said Constitution.

Wherefore, the premises considered, intervenors pray that this their

petition for intervention be filed, and the parties plaintiff and defendant be duly cited to answer the same; and that in case the writ of mandamus asked for should be made absolute, that the said tax *tax* to be levied thereunder be confined and restricted to the property designated by said acts Nos. 71 and 72, approved 23d February, 1852, and situate in the designated districts of this city, Nos. one, two, three, and four, and that the property situate in the said sixth district, and especially the property of your intervenors, be exempted from any liability for said tax, for
43 all such orders as may be requisite in the premises, and for general relief.

(Signed) WM. REED MILLS.

Hearing and continuance.—Extract from the minutes, Dec. 22, 1882.

STATE OF LA., EX REL. HENRY SHEPHERD, *vs.* CITY OF NEW ORLEANS. } No. 10103.

This cause, regularly assigned for this day, was called for trial—Thos. J. Semmes & E. H. McCaleb for relator; C. F. Buck, city attorney, for respondent—when, upon the motion of Wm. Reed Mills, leave was granted Jas. B. Woods and others to file their petition of intervention herein.

And after hearing counsel it was ordered that the case go over till tomorrow at 11 o'clock a. m.

Amended an' supplemental return.—Filed Dec. 23d, 1882.

STATE, EX REL. HE'Y SHEPHERD, *vs.* CITY OF NEW ORLEANS. } No. 10103.

44 Circuit court of the United States.

And now, pending the argument in this cause on the exceptions to the jurisdiction of the court and that the petition discloses no cause of action, and before the trial on the merits commenced for amended and supplemental return, the defendant further avers that since the filing of the return herein proceeding' in execution of the judgment and decree in the case of Southern Bank vs. The City, described in relator's petition, have been taken, and a peremptory notice served on the city authorities to execute the same and obey the mandate therein conveyed; that said order, issued at the instance and motion of R. D. Shepherd, and respondent verily believes and avers that the bonds which said R. D. Shephard holds, or claims to represent, are of the amounts and bounds held and represented by relator herein; that said R. D. Shephard is son of relator herein, and his and the interest of Henry Shepard in the said bonds are joint or identical, and the action of said R. D. Shepard was in behalf of the interest of relator herein.

45 Therefore defendant prays that as in the original return and that relator's demand be rejected, etc.

(Signed) C. F. BUCK, *City Att'y.*

Personally appeared W. J. Behan, mayor, and, being duly sworn, deposes and says that the facts and allegations in the foregoing amended return are true and correct to the best of his knowledge and belief.

(Signed) W. J. BEHAN, *Mayor.*

Hearing and continuance.—Extract from the minutes, Dec. 23, 1882.

STATE OF LA., EX REL. HENRY SHEPHERD, *vs.* CITY OF NEW ORLEANS. } 10103.

This cause came on to be further heard, and the exception of said defendant of no cause of action having been overruled, and the exception of said defendant to the jurisdiction rationæ materiæ of the court having been overruled, the trial of the cause as well as of the intervention of James B. Woods and others was proceeded with, when the fol-
46 lowing-named jurors were sworn to well and truly try the issues joined herein, to wit: 1, Joseph Marcou; 2, F. R. Matthews; 3, Alcée Labat; 4, T. G. Dupin; 5, A. Rogues; 6, Jos. Barnes, jr.; 7, F. J. Herron; 8, C. W. Gould; 9, Fielding McKay; 10, T. C. Murphey; 11, Geo. Koreiger; 12, Albert Legeai.

And, after hearing the pleadings and evidence, the same was continued to Tuesday, December 26th, 1882, at 11 o'clock a. m.

47 *Bill of exceptions marked A.—Filed December 26th,* 1882.

U. S. circuit court, fifth circuit & eastern dist. of La.

STATE, EX REL. H'Y SHEPHARD, *vs.* THE CITY OF NEW ORLEANS. } No. 10103.

BILL OF EXCEPTION.

Be it remembered that on Friday, the 22nd day of December, 1882, the City of New Orleans, & her mayor and councilmen, made defendant herein, having been previously served with a rule from the civil district court of the parish of Orleans to show cause on this day in said court why the alternative writ of mandamus herein issued by said civil dist. court should not be made peremptory, and having been subsequently served with notice that this suit had been removed to this hon. court, were present before this court, by their attorney of record herein, and when this cause was then and there called for the purpose of having the answer and return of said defendant filed, or cause shown by them
48 why said alternative writ of mandamus should not be made peremptory, and called for the purpose of going on with the trial of the issue as might or would be raised by such answer and return, defendants, through their counsel and attorney aforesaid, then and there objected to any proceedings in this cause at that time in this hon. court, and objected to filing the return or pleading to the relator's petition in any manner, and objected to the trial which in the event of filing of return and

answer was then to be taken up and had; all of said objections being made on the ground that on the said 22nd day of December, 1882, the return day of the rule herein issued, the circuit court of the U. S. (admitting for the sake of this objection only that the court might have acquired jurisdiction over the subject matter of the cause) had not yet become legally and fully vested and seized of jurisdiction for purpose of trial on
49 the merits, because the order for removal was signed by the civil dist. court of the parish of Orleans, on the day of Dec. 1882; and the terms of said order, and the acts of Congress in such case made and provided, make this cause returnable in this hon. court on the first of the next term of this court, to wit:

And the filing of the copy of the record in this court before the legal return day does not vest this court with power and jurisdiction for final trial of the cause on the merits until on or after such return day; all of which objections were overruled by the court, and defendants ordered to file their return to the alternative writ and proceed with the trial thereon; to which ruling of the court counsel for defendants excepted, and as these matters do not appear of record makes this his bill of exceptions, and prays the court to approve it and permit it to be filed herein.

(Signed) DON A. PARDEE,
Cir. Judge.

50 *Bill of exceptions.—Filed Dec. 26th*, 1882.

U. S. circuit court, 5th circuit & eastern dist. of La.

STATE, EX REL. H'Y SHEPHARD. *vs.* THE CITY OF NEW ORLEANS. } No. 10103.

Be it remembered that when this cause was called for trial, on the 22nd day of Dec., 1882, and said trial commenced and proceeded (subject to objections reserved by counsel for defence, and expressed in bill of exceptions signed this day, marked A), by consent of all parties and by permission of the court, defendants praying a separate ruling thereon, it was agreed that the plea to the jurisdiction of this honorable court on file of record and made part hereof, to the effect that this court was without original jurisdiction ratione materei herein, and could and did not acquire jurisdiction by the proceedings of removal; that said petition and
51 order for removal were illegal, and could not vest this court with jurisdiction, and the cause should be remanded to the State court, should be heard, argued, and disposed of before proceeding with trial on the merits; whereupon argument was heard, and the court overruled said plea and ordered the trial of the cause to proceed on the merits; to which ruling counsel for defendants excepted; and as these matters do not appear fully of record, for further certainty presents this his bill of exceptions, and prays the hon. the circuit judge to approve the same and permit it to be filed.

(Signed) DON A. PARDEE,
Cir. Judge.

Bill of exceptions.—Filed Dec. 26th, 1882.

U. S. circuit court, 5th circuit & east'n dist. of La.

STATE, EX REL. H'Y. SHEPHARD,
vs.
THE CITY OF NEW ORLEANS. } No. 10103.

Be it remembered that when this cause was called for trial, on
52 the 22nd day of Dec., 1882, and the said trial was about to be commenced and proceeded with (subject to objections reserved), by consent *consent* of all parties, and by permission of the presiding judge, defendants praying a separate ruling thereon, it was agreed that the exception (or demurrer) as pleaded in the return of defendants that relator's petition disclosed no cause of action—said exception being made with reservation of the plea to the jurisdiction of the court, as will appear by reference to the defendants' "answer & return" made part hereof—should be heard, argued, and passed on by the court before proceeding with the trial on the merits; whereupon argument was heard and the court overruled said exception, or demurrer, and ordered the trial of the cause to proceed on the merits; to which ruling and decision counsel for defendants excepted, and as these matters do not appear fully and clearly of record, presents this his bill of exceptions, and prays the court to approve
53 same and permit it to be filed.

(Signed) DON A. PARDEE,
Cir. Judge.

Hearing & verdict.—Extract from minutes, December 26th, 1882.

STATE, EX REL. HY. SHEPHARD,
vs.
CITY OF NEW ORLEANS. } No. 10103.

This cause, as continued from the 23rd instant, came on to be further heard, and the said counsel for the parties respectively, as well as the said jurors empanelled in the case, being all present, the trial was proceeded with, and after hearing further evidence and argument of counsel, and receiving a charge from the court, the jury retired to deliberate upon their verdict, C. W. Gould being appointed foreman thereof.

After due deliberation the said jury returned into court, and then and there, through their said foreman, delivered the following verdict, to wit:

NEW ORLEANS, 26' *Dec.*, 1882.

We, the jury, find for plaintiff.

C. W. GOULD, *Foreman.*

54 Whereupon, upon the motion of counsel for the relator, it was ordered that the said verdict be recorded, and it is done accordingly.

Judgment.—Extract from the judgment docket.

NEW ORLEANS, *Tuesday, December 26th*, 1882.

Court met pursuant to adjournment.
Present, Hon. Don A. Pardee, circuit judge.

STATE OF LOUISIANA, EX REL. HENRY SHEPHARD,
vs.
THE CITY OF NEW ORLEANS. } 10103.

Considering the law and the verdict of the jury herein, it is ordered, adjudged, and decreed that the writ of mandamus herein issued be made peremptory, and that the City of New Orleans, its mayor and council, do proceed at once to carry into effect the provisions of the 37th section of the act of the legislature of the State of Louisiana approved Feb-
55 ruary 23rd, 1852, and the fifth section of the supplementary act approved the same day, and embraced in Nos. 71 and 72 of the acts of that year, as containing a valid contract between the City of New Orleans and its creditors holding the bonds issued according to those acts, and the said City of New Orleans, its mayor and council aforesaid, are hereby ordered and commanded forthwith and annually thereafter to levy and collect the tax of $650,000 commanded by the acts aforesaid, for the purpose of applying the same in the following order: First, to the payment of the current interest of the year; second, to the payment of arrearages of interest of former years until the arrearages are satisfied; and, thirdly, to the purchase of bonds having the shortest period to run; and, further, that the intervention of James B. Woods and others be dismissed at their costs, and that defendants pay all other costs of suit.

Judgment rendered Dec. 26th, 1882.

Judgment signed Dec. 30th, 1882.

(Signed) DON A. PARDEE, *Judge*.

56 *Bill of exception.—Filed Dec. 29th*, 1882.

STATE, EX REL. HY. SHEPHARD,
vs.
THE CITY OF NEW ORLEANS. } No. 10103.

BILLS OF EXCEPTION.

Be it remembered that at the trial of this cause before the Hon. Don A. Pardee with a jury, the cause being about to be submitted to said jury on the evidence and law as given to them by the court, the evidence offered in the cause consisting:

1st. Of the various acts of the legislature of the State of La. recited in the pleadings; also the constitution of the State of La. adopted 1879, and act No. 91 of the acts of the general assembly of La. of the session acts of 1882, which are made part of this bill of exception;

2nd. The record in the case of the Southern Bank vs. Pillsbury, mayor, and particularly the decree of the Supreme Court of the United States in said cause, which record and decree is made part hereof;

3rd. The "proposed" budget of appropriations for the year
57 1883, marked A, made part hereof;

4th. The testimony of a witness that about $650,000 of past-due coupons of all classes of bonds outstanding had been funded, and $150,000 more or less of bonds extended and renewed, under act No. 58 of 1882—

And before the jury retired to deliberate on their verdict counsel for defendants requested the court to charge:

1st. As matter of law, on the face of the papers and pleadings and the statutes of the State of La. recited in relator's petition, and the recital of the decree of the Supreme Court of the United States in the case of State, ex rel. Southern Bank, vs. Pillsbury mayor the relator is not entitled to the relief prayed for by him, and therefore they, the jury, must find a verdict for the defendant, which charge the court refused to give; whereupon counsel for defendant excepted to the refusal of the court so to charge, and tender this their bill of exception, and pray that it be approved, signed, and filed herein.

2nd. And counsel for defendant further requested the court to
58 charge:

"If you find that the legislature of the State of La., in acts No. 58 and 68 of the acts of session of 1882, authorize the City of New Orleans to renew and extend the bonds of the issue held by relator and to levy a tax sufficient to pay accruing interest and provide a sinking fund for the retirement of bonds, if you find further that a large number or any number of have accepted the conditions of said acts, silence on the part of other creditors is a virtual acquiescence on their part in the modification of the contract—relator is not entitled to the appropriation asked to one only, in proportion to the amount of bonds owned by him." Which charge so asked the court refused to give; whereupon counsel for defendants excepted to this refusal of the court, and tenders this their bill of exceptions and pray the court to approve the same.

3rd. And counsel for defendants further asked the court to charge:
59 "As matter of law that the 'proposed budget' offered in evidence for the year 1883, annexed and made part of this bill, is in accordance with the authority conferred by acts 58 and 68 of the acts of 1882; and if you find from the evidence that the appropriation of the proceeds of the 10 mill tax on assessed valuation of taxable property is sufficient to pay the accruing interest on the bonds of relator, and all other bonds of the same character, and to leave a reasonable sinking fund for the retirement of bonds, then there must be a verdict for defendants." Which charge the court refused to give; whereupon counsel for defendants excepted to the refusal of the court to charge as asked, and tender this their bill of exception, and pray the court to approve and sign same.

(Signed) DON A. PARDEE, *Judge.*

[NOTE BY THE CLERK.—The record and decree referred to in the foregoing bill of exception, marked A, mentioned in the 2nd section thereof, and the "proposed" budget of appropriations for the year 1883,
60 marked A, mentioned in the 3rd section of said bill of exception, were not annexed to nor filed with the said bill of exception.]

Bill of exception.—Filed Dec. 29th, 1882.

U. S. circuit court.

STATE, EX REL. H'Y SHEPHARD,
vs.
CITY OF NEW ORLEANS. } No. 10103.

BILL OF EXCEPTION.

Be it remembered that at the trial of this cause before the Hon. Don A. Pardee, with a jury, the evidence and argument having been closed, the judge presiding charged the jury as to the law of the case in substance and words following, to wit: "That if they, the jury, find from the evidence that the allegations in relator's petition were true, that then the relator, as matter of law, was entitled to a verdict as prayed in his petition."

To which charge so given counsel for defendants then and there excepted, and as this matter does not appear of record, presents this their bill of exception and pray the court to approve.

(Signed) DON A. PARDEE, *Judge.*

61 *Writ of mandamus.—Issued January 6th, 1883.*

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth judicial circuit and eastern district of Louisiana.

STATE OF LOUISIANA, ON THE RELATION OF
Henry Shepherd,
vs.
CITY OF NEW ORLEANS ET AL. } No. 10103.

The President of the United States to the City of New Orleans, its mayor and council thereof, greeting:

You and each of you are hereby ordered and commanded forthwith and annually thereafter to levy and collect the tax of six hundred and fifty thousand dollars commanded by the 37th section of the act of the legislature of the State of Louisiana, approved February 23d, 1852, and the fifth section of the supplementary act approved the same day, and embraced in numbers 71 and 72 of the acts of that year, for the pur-
62 pose of applying the same in the following order: First, to the payment of the current interest of the year on the bonds issued by said city under the provisions of said 37th section of said act approved 23d February, 1852, known as act No. 71 of that year; second, to the payment of arrearages of interest of former years on said bonds until the arrearages of interest are satisfied; and, thirdly, to the purchase of said bonds having the shortest period to run.

Clerk's costs	$14 80
Costs in State court	$120 40
Attorney's fee	$20
Marshal's costs	$6
	$161 20

The said tax shall be included in each and every tax bill, and denominated therein as the tax for the payment of consolidated bonds; that it be collected at the same time as those taxes are which may be levied for general purposes, and, when collected, that it be set apart as a special fund, to be used for no other purpose than the payment of the coupons and
63 bonds of the said City of New Orleans, under the provisions of the said 37th section of said act approved 23d February, 1852, and to the sinking fund enacted by said section for the purchase of said bonds.

And you and each of you are further commanded to do any and all necessary acts in your said official capacities for the payment with interest and costs.

And that you, the said City of New Orleans, its mayor and council thereof, and your successors in office, make due return to said court (on or before the first day of February, 1883, and from time to time thereafter as may be required) of all of your acts and doings herein.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of January, A. D. 1883.

[SEAL.] (Signed) T. V. COUPLAND,
D'y Clerk.

Marshal's return.

Received Jan'y 6th, 1883, by the U. S. marshal, and on January
64 6th, 1883, I served a true copy of the within writ of mandamus on the City of New Orleans, defendant herein, by handing the same to William J. Behan in person, in the City of New Orleans, the mayor and representative of the aforesaid City of New Orleans.

(Signed) E. S. CURRY,
D'y U. S. Marshal.

65 *Petition for writ of error.—Filed Jan'y 6th*, 1883.

STATE, EX REL. H. SHEPHARD, }
vs.
THE CITY OF NEW ORLEANS. }

To the hon. the circuit court of the United States, 5th circuit, eastern dist. of La.:

The petition of the City of New Orleans respectfully shows that she is aggrieved by the verdict and judgment herein rendered against her, signed on the , and is informed and believes that there is error therein to her prejudice, and she is desirous of having a prosecuting therefrom a writ of error to the hon. the Supreme Court of the United States:

Therefore she prays that a writ of error to the Supreme Court of the United States be allowed her herein from said judgment, returnable in said court on the 2nd Monday of Oct., 1883, said writ to operate a supersedeas without bond, as the City of New Orleans is dispensed by sec. of the city charter from giving bond in judicial proceedings where she is concerned; but if this hon. court shall hold that said provisions of law
66 is not binding, and is controlled by the acts of Congress and the rules of the circuit, then she prays that the court fix the amount of bond, that said writ may operate a supersedeas; and she prays that relator

be cited as defendant in error to answer same according to law. And she will ever pray, etc.

(Signed) C. F. BUCK,
City Att'y.

A writ of error to operate as a supersedeas is allowed herein, returnable to the Supreme Court of the United States, at Washington, on the second Monday of October, 1883, upon petitioner furnishing bond, with good and solvent sureties, in the sum of sixty-seven thousand five hundred dollars ($67,500.00), conditioned as the law directs.

January 6th, 1883.

(Signed) DON A. PARDEE,
Circuit Judge.

67 *Writ of error.—Filed March 8, 1883.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between the State of La., ex rel. Henry Shepherd, vs. The City of New Orleans, No. 10103 of the docket of this court, a manifest error hath happened, to the great damage of the said City of New Orleans, as by her complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 8th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

67½ (Indorsed:) United States circuit court, eastern district of Louisiana. No. 10103. City of New Orleans, plaintiff in error, versus State of Louisiana, ex rel. Henry Shepherd, defendant in error. Writ of error. Filed March 8th, 1883. Signed, T. V. Coupland, d'y clerk.

68 *Bond for writ of error.*

Know all men by these presents that we, the City of New Orleans, through her undersigned, W. J. Behan, mayor, as principal, and H. Zuberbier ($5,000.00), Chas. H. Lawrence ($5,000.00), J. H. Oglesby ($7,500.00), S. H. Kennedy ($5,000.00), Jno. Phelps ($5,000.00), Edward Connery ($5,000.00), Adolph Meyer ($5,000.00), Chas. F. Buck ($5,000.00), Jno. T. Moore ($5,000.00), D. Jackson (5,000.00), S. Hernsheim ($5,000.00), S. D. Moody ($5,000.00), and Adam Thompson ($5,000.00), each in the amount opposite his name, as sureties, are held and firmly bound unto Henry Shephard, relator and plaintiff, in the full and just sum of sixty-seven thousand five hundred dollars, to be paid to the said Henry Shephard, his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this ninth day of March, in the year of our Lord one thousand eight hundred and eighty-three (1883).

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein State of La., ex rel. Henry Shephard, is plaintiff and the City of New Orleans is defendant, judgment was rendered against said defendant on the 26th Dec., 1882, signed on the 30th same month and year, and the said City of New Orleans, defendant, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Shephard citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such that if the said City of New Orleans shall prosecute her writ to effect, and answer all damages and cost if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed)	W. J. BEHAN.		$7,500.
"	H. ZUBERBIER.		$5,000.
"	CHAS. H. LAWRENCE.		$5,000.
"	EDW. BOOTH.		$5,000.
"	J. H. OGLESBY.		$5,000.
"	SAM. H. KENNEDY.		$5,000.
(Signed)	JNO. PHELPS.		5,000.
"	ED. CONNERY.	[L. S.]	5,000.
"	AD. MEYER.	[L. S.]	5,000.
"	CHAS. F. BUCK.	[L. S.]	5,000.
"	JNO. T. MOORE, JR.		5,000.
"	D. JACKSON.		5,000.
"	ADAM THOMPSON.		5,000.
(Signed)	S. HERNSHEIM.		$5,000.
"	S. D. MOODY.		$5,000.

$2,500 additional. (Signed) J. H. OGLESBY.

Sealed and delivered in the presence of—

(Signed) W. J. BEHAN,

Mayor of City of N. O.

68½ (Indorsed:) No. 10103. United States circuit court, district of Louisiana. State, ex rel. Henry Shephard, vs. The City of New Orleans. Bond for writ of error. Filed March 9th, 1883. (Signed) T. V. Coupland, d'y clerk.

The sufficiency of the sureties upon the within bond is hereby approved, reserving all questions as to the seasonableness of the giving and filing of the same.

New Orleans, March 9th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

69 *Citation in error.*

THE UNITED STATES OF AMERICA:

Circuit court of the United States, eastern district of Louisiana.

The President of the United States to the State of Louisiana on the relation of Henry Shepherd, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein the City of New Orleans is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said City of New Orleans as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

(Signed) EDWARD C. BILLINGS, *Judge.*

69½ (Indorsed:) United States circuit court, eastern district of Louisiana. No. 10103. City of New Orleans, plaintiff in error, vs. The State of Louisiana ex rel. Henry Shepherd. Citation in error.

Marshal's return.

Received March 10, 1883, by the U. S. marshal, and on March 10, 1883 I served a true copy of the within citation in error on the State of Louisiana, ex rel. of Henry Shepherd, defendant in error herein, by handing the same to Thomas J. Semmes, esq., in person, in the city of New Orleans, one of the attorneys of record for the aforesaid defendant in error.

(Signed) J. R. G. PITKIN,
U. S. Marshal, Eastern District of La.,
By E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath

that he served a true copy of the within citation in error on the defendant in error within named, as set forth in his official return hereon.

(Signed) E. S. CURRY,
D'y U. S. Marshal, Eastern Dist. of La.

Subscribed and sworn before me March 12th, '83.

(Signed) T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

70 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 69 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had 1, 2, 3, 4, 5, 6, 7, 8, 9, in the case of the State of Louisiana, ex rel. Henry Shepherd, vs. City of New Orleans, No. 10103 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 13th day of March, A. D. 1883. Nine (9) words erased before signing; two (2) words interlined before signing. Approved.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Don A. Pardee, United States circuit judge for the eastern district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 13th day of March, A. D. 1883.

Three (3) words interlined before signing.

DON A. PARDEE, *Judge.*

(Indorsement on cover:) No. 1229. The City of New Orleans, plaintiff in error, vs. The State of Louisiana; ex rel. Henry Shepherd. E. Louisiana C. C. U. S. Filed 17th March, 1882.

No. 58.] AN ACT

Entitled an act to authorize the city of New Orleans to renew and extend payment of her outstanding bonds, other than Premium bonds, to provide the rate of interest on the bonds as renewed or extended, and authorize the levy of a tax to pay the same.

Whereas, under article 48 of the Constitution, notice of intention to apply for the passage of this act has been duly published in the city of New Orleans, for thirty days, as required, and

Whereas, the present financial embarrassment of the city of New Orleans threatens further to depreciate the value of property, to increase the sum of its indebtedness and to impair good government of its affairs, and whereas, litigation has hitherto resulted disastrously for the taxpayer, and whereas, the public creditors of said city of New Orleans have indicated a desire to settle their claims equitably and to postpone the payment of certain bonds in order to lighten the burden of taxation, and whereas, the Constitution contemplates a definite termination of the corporation's embarrassment by special legislative enactment;

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, that the city of New Orleans, acting through the Board of Liquidation of the city debt or other duly authorized officers, be and she is hereby authorized and empowered to extend the bonded indebtedness of said city, other than Premium Bonds, outstanding at the passage and promulgation of this act, for the period of forty years, from January 1 1883, at a rate of interest not exceeding six per cent; *p ovided*, the city shall have the right to call in said bonds, so renewed or extended for payment at par after the year 1895, upon giving notice to that effect, during a period of three months.

SEC. 2. *Be it further enacted, etc.*, That the provisions of the foregoing section be and they are hereby extended to all bonded obligations of the city, except Premium Bonds, whether due or to become due, including such as may have been merged into judgments, but for which no tax, special or otherwise, has yet been levied; *provided*, nothing in this act shall be considered as a waiver of prescription which may have accrued or may accrue on such bonds in favor of the city.

SEC. 3. *Be it further enacted, etc.*, That to each bond extended or renewed, a certificate or annex, signed by the Mayor and the Administrator of Finance, or Treasurer of said city, shall be securely affixed, which certificate, in express terms, shall import an obligation on the part of the city to pay the principal of said extended bond in forty years from a date not later than the first of July, 1883, with interest as aforesaid; and said certificate shall fully and accurately describe the bond to which it is affixed, and the coupons of interest thereon not yet matured, and shall be of no effect unless accompanied by said bond, which

shall be stamped to correspond with the number and description of the certificate, and an accurate registry shall be kept recording both bond and certificate; and if the bonds to be renewed have been merged in judgment, a certificate of full satisfaction and renunciation of all rights under the judgment shall be attached and the judgment cancelled and annulled in the records of the court, and on the books of the Department of Accounts or Comptroller, if it has been registered under Act 5 of 1870. Coupons of interest payable at the rate of three per cent., semi-annually, shall be attached to and delivered with said certificate, and shall relate to the dates of maturity of the coupons on the extended bonds, beginning with the earliest coupon maturing after January 1, 1883, and continuing during the period of forty years; *provided*, that no bonds shall be extended unless all the unmatured coupons falling due after January 1, 1883, are attached thereto; *and provided further*, that the coupons of the extended bond shall be surrendered, with the corresponding coupons of the certificate, when the latter coupons are paid. The said certificates shall be numbered in the order of the applications therefor, and when called in for payment under the operation of the city's option, the last and highest numbers outstanding shall be called first and interest thereon shall cease at the maturity of the said call. The said extension, during its continuance, shall interrupt all prescription of every kind on said bonds or coupons, and shall not operate any novation thereof, nor shall it be deemed in any manner as altering, weakening or impairing the original contract obligations aforesaid, or the rights and remedies of the holders thereof, under pre-existing laws or constitutions, so that in case of default or non-payment at any time after due demand of the interest stipulated and agreed upon, or of failure to pay the principal thereof when due, then in that case the extension of time granted for the payment of the principal of said bonds and the interest shall, *ipso facto*, be null and void and of no effect, and the holder or holders of said bonds shall be restored to all his or their original rights and remedies, and be entitled to claim and enforce payment of interest at the time and rates originally stipulated, and payment of the principal at maturity, in accordance with and under the laws by which said bonds were originally issued and in force at the time of their creation as if no such extension had ever been stipulated or agreed upon, as herein provided.

SEC. 4. *Be it further enacted, etc.*, That in order to provide for the payment of matured coupons of outstanding bonds, up to and including January 1, 1883, for which no tax has been levied, the city of New Orleans, acting through the said Board of Liquidation of the city debt, be and is hereby empowered and instructed to deliver to the holder of any valid coupons issued by the said city of New Orleans, matured or to fall due prior to January 2, 1883, and for which no judgment tax shall have been

levied, a certificate importing an obligation to pay the sum of the face of said coupons and the interest thereon, at the rate of six per cent. per annum from maturity thereof until January 1, 1883. Said certificate shall be dated January 1, 1883, and be payable in ten years from date or sooner, at the option of the said city; it shall accurately describe the coupon or coupons in exchange for which it is to be delivered, and said coupons shall first be deposited for safe keeping with the said Board of Liquidation, and an accurate registry shall be made by said board of both the coupons and the corresponding certificates. The said registry shall carefully note the date and number of each deposit of coupons, as aforesaid, in the order of deposit, and the corresponding certificate shall be numbered successively in the same order and without regard to the time of actual issue. The option of redemption reserved to the city, shall begin on January 1, 1884, the last and highest numbers of the certificate being first redeemed, and all to be redeemed successively in the same order. One month's public notice shall be given by said city of the amount and numbers of the certificates it will cause to be redeemed. The said certificates shall bear interest at the rate of three per cent. semi annually until paid, to be represented by coupons attached to and numbered identically with said certificates; provided, that said interest shall cease upon any certificate one month after notice as aforesaid shall have been published that the certificate will be paid. Said certificate shall be negotiable and transferable by delivery only without endorsement, and shall invest the holder thereof, with all the rights, remedies and privileges of the original holders of the coupons in exchange for which they were issued; and in case of non payment of either the interest or principal of said certificates punctually when due, the holder may immediately, without further process of law, recover from the city the coupons originally deposited as aforesaid, and may thereupon proceed against the city under the original bond contract, without the operation of any prescription or novation and as is provided in section 1 of this act in the case of the extension of outstanding bonds.

SEC. 5. *Be it further enacted, etc.*, That in view of the enforcement by judicial process of the payment of past due bonds and coupons, with interest and costs, the city of New Orleans is hereby authorized and directed, in order to provide for the punctual payment of the interest and principal of all outstanding bonds and certificates for matured coupons extended, as provided in section 3, except Premium Bonds, to levy on all property within its territorial limits, liable to taxation for other purposes, at the same time and in the same way and on the same tax bill, and to be enforced and collected as are the ordinary city taxes, an annual tax sufficient to pay punctually the interest on all outstanding bonds and extended coupons as aforesaid, when due, which said tax shall never exceed one-half of

one per cent. nor be less than one-quarter of one per cent. on the assessed valuation of all taxable property as aforesaid and the proceeds of said tax shall be duly turned over as collected to the Board of Liquidation of the City Debt, in the same manner as the Premium Bond tax, to be by them deposited to the credit of the City Debt Fund, and to be applied exclusively to the objects and purposes of this act.

SEC. 6. *Be it further enacted, etc.*, That all funds now, or that may be at the time of the passage of this act, in the hands of the Board of Liquidation of the City Debt under existing laws, shall be deposited with the Fiscal Agent of the Board to the credit of the account known as the City Debt Fund, which fund shall be applied exclusively to the purchase, on the most favorable terms, not exceeding par of the face value of any of the outstanding bonds or coupons, and the certificates therefor of said city, which are extended to be retired under the provision of this act; *provided*, that said City Debt Fund shall be used first to provide for, and pay the interest on the bonds and certificates contemplated herein; and it shall be the duty of the Council, in the annual budget, to make an appropriation to carry out the provisions of this act.

SEC 7. *Be it further enacted, etc.*, That the surplus proceeds, if any, of the premium bond tax of each year remaining in the hands of the Board of Liquidation of the city debt, or surplus on hand at the time of the passage of this act, after all the drawn series, interest and premiums thereon, exigible or due to the holders thereof have been provided for or fully paid, shall also be deposited with the Fiscal Agent of the said board to the credit of the account known as the City Debt Fund, and applied exclusively as provided in section 5

SEC. 8. *Be it further enacted, etc.*, That said Board of Liquidation shall render semi-annually to the Mayor of the city of New Orleans, for publication, a full statement of its operations during the previous six months, and give a detailed statement of all property and moneys received and disbursed, or disposed of within said period, and the purposes thereof.

SEC. 9. *Be it further enacted, etc.*, That the city of New Orleans is hereby authorized, and it shall be its duty, to pass all necessary and proper ordinances, and to execute and sign all acts necessary to carry out the provisions of this act in relation to the settlement, adjustment and extension of the bonded debt aforesaid, as contemplated herein with the holders thereof, as herein described and designated, and to prepare and perfect the certificates and coupons required, and otherwise to do and perform what is herein required and directed

SEC. 10. *Be it further enacted, etc.*, That this act, in all its parts, provisions, terms, conditions, obligations and limitations, is to be deemed and to constitute a valid, binding contract between the State of Louisiana, the city of New Orleans, its

residents, citizens and tax payers and the holders of the bonds herein authorized to be extended, and the judicial process of the State of Louisiana, now authorized by law or in force at the creation of said bonded debt as aforesaid, may be resorted to and is to be recognized and applied to the judges thereof, for the enforcement of its provisions in favor of any party having and showing just cause for complaint or injury or a violation of any of the provisions thereof.

SEC. 11. *Be it further enacted, etc.*, That it is hereby made a felony, punishable with fine not exceeding $5,000, and imprisonment at hard labor not exceeding five years, for the fiscal agent, the Mayor, or any other officer of the city of New Orleans, or of its clerks, subordinates, or employes of any description whatever, to feloniously misapply, misappropriate or embezzle any of the funds, taxes, assets or property designed in this act to liquidate and pay said bonded debt, or the interest thereof, or to divert the same, or any part thereof from the legitimate use and purpose herein provided, and such person or persons, on conviction thereof, according to law, shall be punished accordingly.

SEC 12. *Be it further enacted, etc.*, That any legal proceeding instituted to prevent, hinder, delay or obstruct the operation of this act, or any of its provisions, in whole or in part, after its promulgation as a law, shall be tried summarily and by preference over all other causes or proceeding, whether the court, having jurisdiction, be in vacation or not; and if appealed to the Supreme Court of the State of Louisiana, it shall be tried and determined by preference, whether said court be in regular session or in vacation; and it is hereby made the duty of the judges thereof, if in vacation, to determine the controversy within the least delay, and the decree pronounced shall become final on the twentieth day thereafter, unless a rehearing be granted, in which latter event, the cause shall be heard *de novo* and determined by said court, and the decree pronounced thereon shall become final then without further delay.

SEC. 13. *Be it further enacted, etc.*, That this act shall take effect from and after its passage, and all laws or parts of laws inconsistent or in conflict therewith be and the same are hereby repealed.

R. N. OGDEN,
Speaker of the House of Representatives.

GEO. L. WALTON,
President pro tem. of the Senate.

Approved June 30, 1882.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy:
WILL. A. STRONG,
Secretary of State.

No 68.] AN ACT

Entitled "An Act to authorize the city of New Orleans, through her proper authorities, to levy and collect annually, commencing with and in the year 1883, a tax not to exceed (5) five mills, on all taxable property, in addition to the ten mill tax authorized by the Constitution of 1879, and the tax required by the Premium Bond Act, to pay the annual interest accruing on all outstanding bonds of the city, other than premium bonds, to provide for the use of the surplus proceeds of said tax as a sinking fund; to prescribe penalties for violation of this Act and for other purposes."

Whereas, Due notice, in accordance with the requirements of Article 48 of the Constitution of the State, of intention to apply for the passage of this act, has been given and published during thirty days; and

Whereas, Judgments have been and are being rendered against the city by both State and Federal courts, enforcing all existing contracts and obligations of the city, regardless of all legislation, constitutional or ordinary, restricting, limiting or taking away the powers of taxation in existence when the contracts were created, which entails heavy expense, unsettles values and destroys private and public confidence; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That the city of New Orleans, through her proper authorities, be, and she is, hereby authorized to levy and collect annually, commencing with the year 1883, a tax of (5) five mills on the assessed valuation of all property, movable and immovable, within her limits in addition to the fifteen mills which she is authorized to levy under existing laws; the proceeds of said tax when collected, shall be turned over monthly to the "Board of Liquidation of City Debt," to be applied as follows, to wit:

1st. To the payment of the annual interest on the bonds known as the Consolidated Bonds of the City of New Orleans, issued under Acts Nos. 71 and 72 of the Acts of the General Assembly of 1882, and said interest shall be paid at the time and in the manner as provided in said bonds, and interest coupons attached thereto, the tax levied and collected in 1883, to be applied to the payment of the interest coupons maturing during that year, and so annually thereafter.

2d. To the payment, in the same manner, and on the same conditions, of the interest on all other bonded obligations outstanding, not embraced in the foregoing, and not funded into Premium Bonds.

SEC. 2. *Be it further enacted, etc.*, That any surplus remaining out of the proceeds of this tax, after the payment of interest as aforesaid, shall be held as a sinking fund, and shall be applied to the extinction or retirement of any class or issue of bonds, or

past due interest coupons on same, embraced in section first of this Act, by purchase thereof, from the lowest bidder; *provided*, 1st. That bids being equal in amount, the preference shall be given to "Consolidated Bonds;" *and provided*, 2d. That no bonds shall be redeemed at a higher price than par.

SEC. 3 *Be it further enacted, etc.*, That on the first day of February, 1884, and annually thereafter, the Board of Liquidation, or the officer or officers, who may then be charged with the execution of the provisions of this act, shall publish a statement embracing:

1st. Amount of tax received under the levy and for the purpose described in this act.

2d. Amount paid out, specifying in detail, on what class or issue of such bonds, interest, and how much was paid.

3d. Amount of "surplus" on hand, and notice shall then and there be given inviting bids for sale of bonds, or past-due coupons, and a day fixed when same shall be received and acted on And such bids, to the extent of funds on hand; shall be accepted, and it shall be unlawful to reject same, unless the price asked by the offerers exceeds par, or exceeds the then prevailing market value of the bonds in question.

SEC. 4. *Be it further enacted, etc.*, That at the first levy of the tax herein provided, the ordinance providing same shall contain a full and complete statement of the bonds for the payment of interest on which provision is made by this Act, and if any interest coupons, provided for by this Act, are not presented for payment on or before the first day of April of the year immediately succeeding that in which the tax was levied, the money to the credit of such coupons, not presented, shall not thereafter be held to the credit of such coupons, but shall become part of the sinking fund hereinbefore provided, and be applied at once to the retirement of bonds or past due coupons, as herein provided, and without awaiting the time for the annual report provided in section 3 of this Act.

SEC. 5. *Be it further enacted, etc.*, That it shall be, and is hereby made a misdemeanor on the part of any officer or officers, or persons, having any functions to perform in connection with the execution of this Act, whether as officers or employes, to divert or misapply any of the proceeds of the tax herein authorized, or to fail or neglect to perform strictly all or any of the duties imposed by this Act, and any officer or employe found guilty of violation of any of the provisions of this Act, or of neglect to perform any positive duty enjoined thereby, shall, on conviction, be fined not less than five hundred dollars, nor more than five thousand dollars, and suffer imprisonment at the discretion of the Court.

SEC. 6. *Be it further enacted, etc.*, That this act shall only take effect in case the settlement provided for and proposed in

an act passed at the present session of the General Assembly, entitled "An Act to authorize the city of New Orleans to renew and extend payment of her outstanding bonds other than Premium bonds;" to provide the rate of interest on the bonds as renewed or extended, and authorize the levy of a tax to pay the same, shall not be accepted by the holders of the bonds therein provided for, and the tax authorized by this act shall not be levied and collected if the tax authorized by the said act providing for the settlement of the debt shall be enforced, and in case said settlement shall be accepted by only a portion of the holders of said city bonds, then only a portion of the tax provided for in this act shall be levied sufficiently in amount to meet the requirements of the other bonds, and only a portion of the tax provided for in said act for the settlement of the city debt sufficient to meet the requirements of the bonds whose holders accept said proposition; it being the intention that not more than five mills shall be levied under either or both acts for the benefit of the bonds of the city of New Orleans other than premium bonds.

R. N. OGDEN,
Speaker of the House of Representatives.

GEO. L. WALTON,
President pro tem. of the Senate.

Approved July 1, 1882.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy:

WILL. A. STRONG,
Secretary of State.

12-621

SUPREME COURT U.S.
FILED
APR 9 1883
JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

STATE EX REL. HENRY SHEPHERD, DEFENDANT IN ERROR

Brief of Plaintiff on Defendant's Motion to *Dismiss* or *Affirm*.

CHAS. F. BUCK, City Attorney.
For Plaintiff in Error.

A W Hyatt, Print, 73 Camp St. NO -24,933

To the Hon. the Judges of the Supreme Court of the United States.

No. 1229.

CITY OF NEW ORLEANS

versus

STATE Ex Rel. HENRY SHEPHERD.

The annexed brief is respectfully submitted to the court without prejudice to the motion hereinbefore made for extension of time to prepare briefs.

Irrespective of the motion for simple extension of time, for hearing of the motions to dismiss and affirm, the right is reserved to object to the hearing of such motions at this time.

The court has established the practice that a defendant in error may docket the cause before the return-day, and move to *dismiss:* but a motion to *dismiss* AND AFFIRM has never yet been entertained by this court in the manner attempted. I respectfully submit that a motion to *affirm*, which asks the *final action and judgment* of this court, cannot be entertained, before the return-day of the writ.

With this reservation the annexed brief is submitted, with the prayer that, at all events, further time be granted for discussion on the motion to *affirm*.

CHAS. F. BUCK, City Attorney.
For Plaintiff in Error.

To the Hon. the Judges of the Supreme Court of the United States:

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

STATE EX REL. HENRY SHEPHERD, DEFENDANT IN ERROR.

Brief of Plaintiff on Defendant's Motion to *Dismiss* or *Affirm*.

FIRST.

On the Motion to Dismiss.

This motion is made on the following grounds:

1st. That the intervenors, whose intervention was allowed *to be filed* by the Circuit Court, and whose intervention was dismissed by the judgment of the court, are not made parties to the writ of error.

2d. The writ of error is sued out by the City of New Orleans alone, whereas the Mayor and Council of said City are parties to the judgment rendered by the Circuit Court, and are necessary parties to the writ of error.

3d. That the bond is given by the City of New Orleans and not by the Mayor and Council of said city.

I.

Points "second" and "thirdly" stated, embrace but one thing, to-wit: are the Mayor and members of the City Council parties in this suit, individually and distinct from the corporation?

No one ever thought so until this motion to dismiss was filed.

The suit is against the "City of New Orleans," named as

sole defendant by the relator himself. See Trans., page 1; also prayer of relator's petition, Trans., page 5.

True, the prayer is that the City of New Orleans be commanded, "*through* the Mayor, Wm. J. Behan, and the members composing the Council" But such language has no technical significance in the absence of personal citation. The only legal mode of bringing the city into court, is "*through the Mayor*," and no one *till now* contended that language, that "the city be cited or commanded through the Mayor," etc., and citation so issued would bring the Mayor into court, so that he became an individual defendant.

The rule to "show cause" issued "to the *City of New Orleans*," through its Mayor, etc. Trans. p. 8. The sheriff's return is as follows:

"Received, December 14th, 1882, and on the 15th day of December, 1882, I served a copy of the within writ of mandamus and accompanying petition on the CITY OF NEW ORLEANS, and the members composing the City Council of New Orleans, *through* W. J. Behan, ITS Mayor, in person." Trans. p. 9.

It need not be argued to this Honorable Court that so much of this "return" as purports a service on the members of the City Council, through *its* Mayor, is a piece of circumlocution, as harmless as it might almost be styled ludicrous.

The substance and legal effect of the return is that the city of New Orleans was served with the papers through W. J. Behan, its Mayor.

The title of the suit is continuously repeated "vs. the City of New Orleans." Petition for removal, Trans. p. 9.

And whom did our learned friends consider "parties" when they filed their bond for removal? Some time there is point and justice in the common saying, "it is a poor rule that does not work both ways." Surely, if the "Mayor and members of the City Council" are necessary parties to the writ of error, it must be that they are *as such*, individually and distinct from the corporation, parties in the suit; but if they are "parties," they must

have been such since the inception of the suit. Counsel for relator did not so consider. See their removal bond. Trans. page 10. The principal and surety in said bond bind themselves to the "*City of New Orleans*," only.

Throughout the Record and trial the *City of New Orleans* was considered by *both* sides to the litigation the sole defendant. The city had been ordered to show cause in the Civil District Court, on a day fixed, why she should not comply with the demand, etc. After the Record had been carried, by the removal, to the Circuit Court, counsel for relator filed a motion, fixing a day for hearing of the rule, previously so issued from the Civil District Court. Trans., page 11.

In this motion it is suggested "that prior to the removal of the above entitled cause ('State ex Rel., etc., vs. The City of New Orleans'), an alternative writ of mandamus had issued and had been served upon *defendant* (not defendants), returnable," etc. — * * * "it is ordered that *defendant*, through the Hon. Wm. J. Behan, Mayor of the City of New Orleans," etc., etc. And the Marshal's return on this order is that he served it "on the City of New Orleans, defendant herein, by handing a copy of the same to Wm. J. Behan, Mayor of said City of New Orleans, in person." Trans. p. 11.

And so, throughout the Record, the only *defendant* in the case, until this motion to dismiss is made, is the City of New Orleans.

Relators, under the practice regulating the issuance and execution of the writ of mandamus, might, perhaps, have ignored, *pro forma*, the corporation, and directly asked the writ against the individual officers: still, under the jurisprudence of Louisiana, the city would have been *real* defendant. They have, instead (which under the authorities they had the clear right to do), made the *city* the *sole* defendant. In a similar case recently, the Supreme Court of the State of Louisiana denied a motion to dismiss, based on the same grounds. It is the case of State ex Rel. Samory vs. City of New Orleans, reported in 34

Ann. page 468 (Pamphlet No. 5). In that case the "city" appealed without bond: it was contended that the "Mayor and Administrators" were the defendants, and should have given bond. The court said: "In plaintiffs' (appellees') petition in "this case, the character of this action is distinctly defined, and "the real defendant designated. In his prayer he uses this "language: 'Relator prays for a writ of mandamus *to the City "of New Orleans, through its*—(the italics are by the court)— "Mayor and Administrators' (naming them). Independent of "this, the suit is, to all intents and purposes, against the cor- "poration of the City of New Orleans, the object being to bind "and affect the city in her corporate capacity by the judgment "sought to be obtained against her. * * * The "motion to dismiss is denied."

It will be observed, as stated parenthetically, by the court, in the above cause, the Mayor and Administrators were mentioned by name. In the present case, the prayer is "to the city, *through* its Mayor and Council."

Clearly the City is the only defendant. Who are the *Council?* The Council is not a corporation. It is an assembly composed of thirty members—(City Charter of 1882). Who are these members? they appear nowhere in the pleadings as bound for anything. What should they, as individuals, give bond for? They are strangers to the record.

If anything more remains to be said on these points, in the motion to dismiss, it is to apologize to this exalted tribunal for discussing them at length; they must strike the common sense of justice, not to speak of the judicial mind educated in the science of law, as obviously nominal, unsubstantial, *frivolous!*

II.

It is claimed that the writ of error should be dismissed, because

"The intervenors, whose intervention before trial was allowed *to be filed* (mover's italics) by the Circuit Court, and

whose intervention was dismissed by the judgment of the court, are not made parties to the writ of error."

It will be an easy matter to demonstrate that these "intervenors" are not *parties* in this suit; that there is *no issue* between them and the plaintiff and the defendant, or either of these; that the intervention was never at *issue*, could not be, and was not tried; that the *jury* did not pass on it; that the formal dismissal of the intervention in the judgment precludes nothing, and is mere surplusage; that the intervenors have no interest in *maintaining* the judgment to which the writ of error is taken, are not parties to said *judgment*, and, in fine, are not necessary parties as defendants in writ.

Before discussing the point, however, the court is respectfully referred to the fact that said intervenors, whose interest, if any they have, is with the city, have filed a paper in the Circuit Court, from which the writ is prosecuted, purporting to take cognizance of the writ of error, making themselves parties defendant thereto, and waiving citation.

A certified copy of this waiver and appearance is filed with the Record in this cause, and notice thereof given to the defendant in error, who has moved to dismiss.

It cannot be questioned that this appearance, if indeed said intervenors are necessary parties, cures the defect. The return day for the writ in this court has not yet arrived, and citation may issue and be served at any time before such return day.

Relator certainly cannot complain of this appearance; it accomplishes everything that their formal citation would have accomplished; they become parties for all purposes for which they would have been such, had they been regularly named in the writ and cited. Under the writ sued out by the City of New Orleans, the judgment could not be amended *for* or *against* the intervention, even as between the city and intervenors; it cannot be amended or charged as between intervenor and plaintiff. The intervenors, therefore, if in the suit at all, are mere lookers-on, without possibility to give or receive anything.

But, under all circumstances, these "intervenors" are not *parties* to the judgment for which the writ of error is taken. Their status must be determined by the Record, and the Record interpreted in the light of the laws of Louisiana.

Arts. 389, et seq., La. Code of Practice, prescribe the condition under which intervention may be filed; the object and effects of it. An intervenor may join plaintiff against the defendant, or the defendant against the plaintiff; or, he may *oppose both*. Art. 389. The last is attempted in this suit.

The intervenor must submit himself to the control of the principal litigants: he has no *control* over the suit: he must not *retard* the principal suit: he must be "always ready to plead or "exhibit his testimony, *because he has always his remedy by a sep-* "*arate action to vindicate his rights.*" Art. 391. Intervenor is considered a *plaintiff* as to his cause of action. Art. 392.

"This petition (of intervention) must be served on the party "*against whom* it is directed, in order that *he may answer to the* "*same in the delay given in ordinary suits.*" Art. 393.

Now let us turn to the Record before us. The prayer of the intervention asks for specific relief; it therefore *opposes* both the plaintiff and the defendant; it is to all intents and purposes a distinct suit, urging a cause of action which could not by any possibility be precluded by any judgment between relator and defendant. It prays that the "*parties, plaintiff and defendant, be duly cited to answer the same.*"

No citation ever issued to either party and none was served; and nowhere in the record will your Honors find an appearance, plea, exception, demurrer or answer to this intervention by either party. There was no legal notice of the citation and no issue, tacit and legal, or express, between the intervenor and either "party" to the suit.

So much of the judgment as purports to "dismiss the intervention of J. B. Woods and others at their cost," is simple surplussage—an *absolute nullity* on the face of the papers deciding

nothing, estopping no one: leaving the intervenors exactly where they were before they filed their intervention.

The jury, in rendering its verdict, ignored the intervention: yet, as we have seen, the intervention prays for specific relief against both the plaintiff and defendant: there should have been a separate verdict. There is nothing to show that the jury was waived as to the *intervention*, and the same submitted to the Court.

The entry from the minutes showing how the cause was given to the jury is on page 19 of the Transcript. And on same page, as a part of the "minute entry," is the following:

"After due deliberation the said jury returned into court, "and then and there, through their said foreman, delivered the "following verdict, to-wit:

"*We, the jury, find for* PLAINTIFF."

Not one word of the intervention; and this verdict, *Transcript, page 20*, is made the basis of the judgment dismissing the intervention.

"Considering the law and the *verdict of the jury*," *etc.*

When the intervention was filed, as the case was called for trial, it does not appear that any objections were made—but no rights were waived.

As appears from the Record, page 15, it was permitted to be filed when the case was *called for trial*. The intervenors could not, as we have seen, retard the progress of the trial; they were simply ignored. The trial *had to proceed*.

For the purpose of putting the intervention at issue—which opposed *both* parties—we were entitled to citation and ten days' delay. It was not asked: nor, on the other hand, was *appearance made or issue joined*, and the intervention remained, we repeat, a purposeless document on which nothing has been adjudged.

But even if we be in error in this regard, we assert that the intervenors are not necessary parties to the writ.

In first place we submit that as intervenors opposed both the plaintiff and defendant in a cause of action which they can or could assert at any time, the judgment dismissing them is a *separate* and *distinct* judgment from that founded on the issue between relator and the city. They are in no sense party to that judgment; their appearance as defendants in writ is utterly without purpose; the decree against the city can be affirmed or reversed, and no right or interest of the intervenors is touched.

Under the laws and practice of Louisiana, an intervenor is not necessarily a party to an appeal between plaintiff and defendant. Weil vs. Weil, 28 Ann. 241. On the contrary, the intervenor having always the right left to resort to an original action, his relation to a suit must be tested by his actual condition in it, and not by his *nominal* appearance If he have no interest in the maintenance of the judgment appealed from, he need not be made a party, nor can he himself take an appeal from a jukgment, as between plaintiff and defendant, if he has not sought to recover something for himself. 28 An. above cited.

The cases cited by our learned adversaries in 15 La. 362 and 12 Rob. 203, are not strictly cases of "intervention or interpleading," under the articles of the Code hereinbefore cited. On the contrary, in both cases there was a *concursus* or number of persons, some of them *called* intervenors, but who were really "third opponents." C. Practice, art. 395, et seq. In these cases the court held that all persons asserting rights to the fund in controversy must be parties.

In 27 Ann., Lane vs. Clarke, the Supreme Court of the State held: "An intervenor, who has been dismissed, as of non-suit, is not a necessary party to the appeal."

The court said: "A motion is made to dismiss this appeal, on the grounds, that one Bender, who was intervenor, is not made a party. The Record shows that this intervention was dismissed as of non-suit, *and he has not appealed.* He, therefore, has no interest in maintaining the judgment between plaintiff

and defendant, and is not a necessary party to the appeal. *He is no longer a party to the suit.*"

With no citation, no appearance, no issue joined, no verdict of the jury, not an indication, except the one entry on the minutes, that intervenors participated in the trial, what force could the judgment dismissing the intervention have against them in a new proceeding? If not an absolute nullity, would it have the force of a *final* judgment supporting the plea of *res adjudicata?* Manifestly not.

We submit, therefore:

1st. That so much of the judgment purporting to dismiss the intervention, is mere surplusage and absolute nullity.

2d. If it have any effect, it is simply that of a dismissal, as in case of non-suit.

3d. That it is a separate and distinct judgment from that from which the writ is taken.

And in no one of these contingencies are the "intervenors" necessary parties defendant to the writ of error prosecuted by the City of New Orleans.

At all events, finally, should this Honorable Court hold that these intervenors should have been cited as defendants in error, that their waiver of citation and voluntary appearance, filed in the Circuit Court of the United States, from which the cause proceeds, on the 2d of April, 1883, a certified copy of which has been filed in *this* court, and made part of the record, cures the defect.

As citation can be made any time before the return day of the writ, it is respectfully submitted that the "waiver" and appearance are in time.

On the Motion to Affirm.

The limited time at command does not permit me to discuss at length the merits of the cause as involved in the motion to "affirm." Trusting that this Honorable Court will grant the application hereinbefore submitted, for postponement of consid-

eration of these motions, I will only call the attention of this Honorable Court to the fact that the Record presents for adjudication a most important question of jurisdiction which has never yet been passed upon by this court.

This is a proceeding commenced in the State courts of Louisiana as an *original* suit to compel by means of the writ of mandamus the execution of an alleged legislative *contract*. It is admitted that the Circuit Court could not have *originally* entertained the suit. Could or did it acquire jurisdiction by the removal acts?

In the late important decisions rendered by this Honorable Court, in the case of State ex rel. Elliott et als. vs. Allen Jumel et als., the question whether "removal" vested jurisdiction, under the Acts of Congress, in the Circuit Court, was expressly reserved. This court said: "Certainly no suit begun in the Circuit Court for such relief would be entertained, for that court can ordinarily grant a writ of mandamus only in aid of some existing jurisdiction. * * * Our attention has been called to no case in the State courts of Louisiana in which such relief has been afforded, and the jurisdiction of the Circuit Court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed, *a question we do not deem it necessary now to decide.*"

And, in the case at bar, you are asked to decide on a motion to *affirm* this important question of jurisdiction.

The practice and traditions of this court do not sanction such a demand. The right of appeal is a sacred one: and litigants must not be lightly deprived of the opportunity of a full and thorough examination of their causes. Every appeal involves delay; but cannot be held to have been taken for that purpose, if the Record presents complicated and, in some respects, absolutely novel and undetermined issues.

It is respectfully prayed that the motions to dismiss and affirm be denied.

CHAS. F. BUCK, City Attorney,
For Plaintiff in Error.

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OFFICE SUPREME COURT U.S.
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SUPREME COURT OF THE UNITED STATES.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

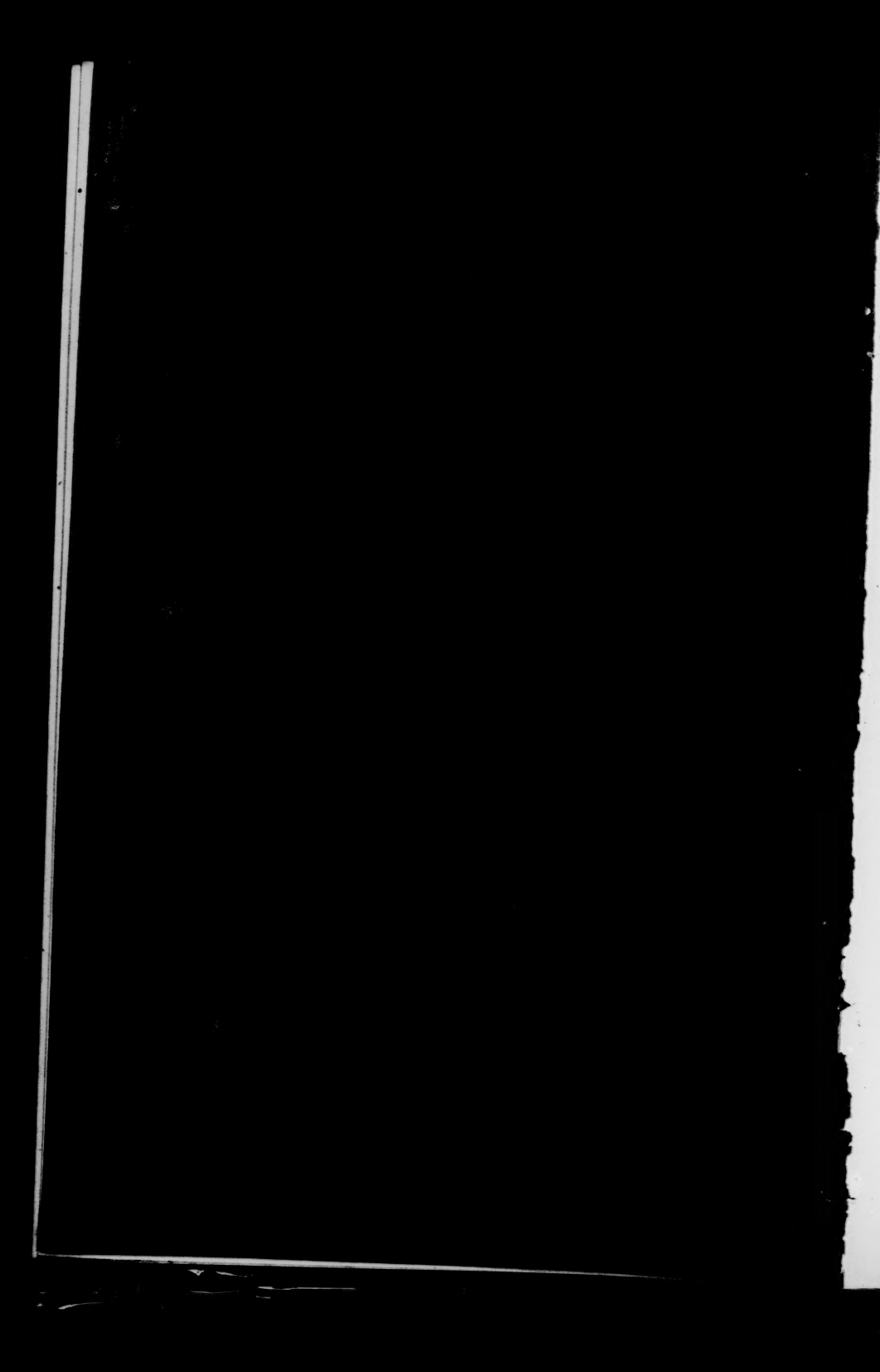
versus

THE STATE EX REL. HENRY SHEPHERD.

Supplemental Brief of Plaintiff in Error, on Defendant's Motion to *dismiss* and *affirm*.

CHARLES F. BUCK, City Attorney,
For Plaintiff in Error.

A. W. Hyatt, Print, 73 Camp St., N. O.—25,015



SUPREME COURT OF THE UNITED STATES.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

THE STATE EX REL. HENRY SHEPHERD.

Supplemental Brief of Plaintiff in Error, on Defendant's Motion to *dismiss* and *affirm*.

I.

Can the Motion to "Affirm" be entertained at this time?

The amendment to Rule 6, which permits a motion to "affirm" to be united with one to dismiss, has received an interpretation from this Court which we pray to recall to the minds of your Honors, before discussing the merits of the motion further.

In the very cases cited by mover—Hinckly vs. Morton, 103 U. S. R. 764, and Micas vs. Williams, 104 U. S. R. 556—the court held, substantially, that the motion to "affirm" will not be considered by the court if the motion to dismiss was not serious or had not a "sufficient color of right."

Now, this Court must be satisfied that the two grounds on which the dismissal is moved are absolutely frivolous. No skill of sophistry or breadth of illustration can save the pretension that the *Mayor* and *members* of the City Council should have individually joined in the writ of error and bond, from this charge. The very article of our Code—Article 844—cited by mover, negatives his affirmation. It provides that when a mandamus has issued against a corporation, the notice shall be served on the *Mayor*, or presiding officer, and if the corporation,

or the body of the directors, disobey the order "IT shall be punished for contempt by the sequestration of its revenues," etc.

The point that the "intervenors" should be parties to the writ, is no less insubstantial. This is fully demonstrated in the brief heretofore filed. As the completing complement thereto we will, in support of the proposition that so much of the judgment from which the writ of error is taken, as dismisses said intervention, is an *absolute nullity*, refer your Honors to the textual provisions of the Louisiana Code, on the subject; as well as to the decisions of the Supreme Court of the State, establishing the two propositions:

1st. That a judgment rendered without citation or voluntary appearance, is an absolute nullity, and

2d. That such nullity, when apparent on the face of the papers, may be pronounced on appeal, and urged even collaterally by anyone in interest.

Art. 606, Code of Practice, provides:

"The vices of form for which a judgment can be annulled are the following:

1. Not applicable.

2 If the defendant, although qualified to appear in a cause, have been condemned by default, without having been *cited.*

3. Not applicable.

4. If the defendant has not been legally *cited.* and has not *entered appearance, joined issue,* or had not a regular judgment by default taken against him.

And Articles 608 and 609 provide that the nullity may be demanded on appeal when "*it is apparent on the face of the records.*"

And the Supreme Court of the State has frequently enforced these articles, declaring null and void judgments, on appeal, where it appeared on the Record that there had been no legal citation, nor appearance equivalent to it.

1 Ann. 171; 2 Ann. 492; 10 Ann. 642.

And in Williams vs. Clarke, 11 Ann. 761, it was held that such *absolute nullity*, resulting from want of citation, "may be urged, even collaterally, by any one in interest."

Are we not then justified in assuming that this motion to dismiss rests upon no serious ground? That it is used as the stepping-stone to the motion to affirm? If so, this latter cannot be entertained. This Honorable Court has, as we have seen, established, for reasons and from motives readily understood, a distinction which is fraught with no injury to the defendant, and protects the rights of plaintiff in error.

As stated in the brief, already on file, as far as the printed Reports of the decisions of this Court go, this appears to be the first case in which the motion to *affirm* is united with the motion to dismiss, on a Record brought up by the defendant in error, before the return-day of the writ.

Perhaps, in the abstract, no good reason can be given why this motion should not be entertained, as well as the motion to dismiss. But there are obvious and material distinctions which must carry their weight. A motion to dismiss, in the very nature of things, must be founded upon an assertion that the appeal or writ of error is not *perfected* or *completed*:—that there are reasons why this Court cannot hear the case:—that the case is not in the Court for *final* hearing. Therefore, to hold it in suspense till the return-day, when it is apparent that it must then be dismissed, *without inquiry into the merits*, seemed so unreasonable that this Court, in the instances cited, established the practice of permitting a defendant to docket a cause and move its dismissal before the return-day. But the motion to *affirm* presupposes a complete jurisdiction, in this Court, over the case; *ratione personæ et materiæ*. It is to all intents and purposes a hearing of the cause on the merits: the action of the Court must take the form of a final decree.

This is a question of practice, wholly within the discretion of your Honors: and while the Court justly guards against an over-crowded docket by holding out a constant check to frivolous

appeals, it has always preserved an equitable and exalted standard in favor of full and entire justice. And in consonance with that, while it should relax none of its severity, it should be loath to extend its rules to an interpretation fraught with danger to the sublime moral of the perfect appeal.

MOTION TO "AFFIRM."

Principal stress is laid on the motion to affirm on the assertion that this present controversy has already been determined between holders of the bonds and the city of New Orleans, in the case of the State ex rel. Southern Bank vs. Pilsbury. This point we might concede; though for the purposes of the motion under consideration we will claim that the situation is materially altered since the "issue" was joined in the Southern Bank case; and your Honors must decide this case according to issues presented by the *pleadings*, which embrace the *defendant's answer* as well as the relator's petition.

It may not be out of place, in this connection, for a moment, to call the attention of this Honorable Court to the fact that the City of New Orleans does not stand before it in the attitude of one denying a just debt or repudiating valid obligations.

The answer of the City and the Acts of the Legislature, thereto made part, speak for themselves.

The cases of Ranger, 98th and 102 U. S. R., Rebecca Wolffe, 103 U. S., and especially the case of Southern Bank vs. Pilsbury, must have informed this Court of the financial condition of the City of New Orleans. But legislative restraints on the taxing power of the city, to the prejudice of previously acquired rights, have long since been set at naught. The holders of the bonded debt have received at the hands of *State* and Federal Courts all that they are entitled to: in the year 1882 the city levied special taxes to the amount of more than $1,700,000 00, principally to pay past-due coupons of the "consolidated" bonds. This very "relator" has received

payment of his coupons, or has taxes levied to pay them, down to the year 1882.

In this condition of affairs the Legislature, in 1882, authorized the City of New Orleans to levy taxes to the extent of one per cent. to meet all her obligations. See city's "Answer," Trans., p. 12, et seq.—and the question is presented by this Record, among others, whether the relator can complain, although the strict letter of *his* contract is not followed, so long as all just and matured claims are satisfied. It is demonstrated that the one per cent. tax will net sufficient to pay all accruing interest, and leave a considerable surplus as a sinking fund. This must be applied, first, to the reduction of the consolidated bond debt. It is shown that a number of creditors of the city have accepted the extension offered by Act No. 58, Acts of 1882, of the Legislature of Louisiana.

Upon these facts and pleadings bills of exception were reserved to the charge of the court, to the jury, found on pp. 20 et seq. of the record.

The position is wholly different from that presented in the Southern Bank case: there the city denied any and all duty and obligation to levy a tax. The plea went to the destruction of the whole issue of bonds. Here it appears that the city is *paying:* the relator is not satisfied with the *manner* in which she proposes to pay. Others are: so proved, by their acts and their silence. Can relator do more than ask payment of his own bonds?

You have, therefore, before you, presented by proper pleadings and bills of exception, besides the over-shadowing question whether the Circuit Court has jurisdiction, important issues which have never been passed upon by this Court, and which are certainly serious; and if not legal, most equitable. What can the relator advance to justify this vindictive and unnecessary assault on the good order and regular movement of an oppressed and over-burdened community? What is he entitled to that is not offered to him? The interest on his bonds is provided for: the

bonds themselves can be redeemed out of the tax about to be levied. If they *must* be redeemed it will require only $118,000 to do it; not $650,000.

But a graver question than all these is presented by this record. Had the Circuit Court jurisdiction over this cause? Its history is sufficiently well understood. Relator admitting, now and at all times, that it is a suit which the Circuit Court could not have entertained originally, claims that removal proceedings vested jurisdiction of the cause in the Circuit Court.

It does appear to us that, for the present purpose, the motion to affirm, the question might be left where, as we have shown, this Honorable Court placed in the Elliott case, cited in our original brief, as open and undecided.

Our learned adversaries rest on the authority of Railroad vs. Mississippi, 102 U. S. 135.

Gaines vs. Fuentes, 92 U. S. 10, and Kern vs. Huidekoper, 103 U. S. 492—and they formulate the proposition which they claim those cases establish, thus:

"Although the Circuit Court has no original jurisdiction to issue the writ of mandamus as an original writ, yet such power can be exercised in a case commenced in the State Court, and then removed."

Not any one of the three cases, nor all three taken together, warrant this broad conclusion.

In the Fuentes case, this court held that a suit to annul the probate of a will was a "suit in equity," within the meaning of the Acts of Congress, and, therefore, removable.

Railroad vs. Mississippi was a mandamus case, it is true, but of so exceptional and peculiar a nature that that feature need not be examined. An injunction, or a mandatory injunction to remove the bridge, in controversy, would have provoked the same issue. The suit was not a mandamus suit, in the usual

sense of the word, and bore not the slightest analogy to the present case. And it is a fact that the nature of the proceeding was not once referred to in the discussion whether the case was removable. The defendant, among other things, pleaded the authority of Act of Congress as a defense to the suit, and the removal was held legal, because this court considered the case one "which, in the sense of the Constitution, and of the Statutes of 1875, arose *under the laws of the United States.*" See decision referred to, 102 U. S., pp. 140 and 141.

The Huidekoper case goes, perhaps, a step further. There it is declared—though that portion of the opinion seems *obiter*—that if the conditions for removal concurred, the Circuit Court might acquire jurisdiction over a cause which it could not have originally entertained.

But was it then, or ever held, that it would or could issue the writ of mandamus in the manner, and for the purposes attempted in this suit?

In all the cases cited, it was held that the jurisdiction of the Circuit Court arose directly from the Acts of Congress; but in regard to the writ of mandamus, Congress, by giving authority to issue it only, "in aid of a jurisdiction previously acquired," seems to prohibit its issuance for any other purpose.

The point that the "removal" was illegal, and that the Circuit Court acquired no jurisdiction to try the cause, was expressly presented for decision to the court, before proceeding to trial on the merits. See "Peremptory Exception," Record, 11 and 12, and Bill of Exception, Record, p. 18.

There was no time or opportunity for a formal motion to remand. The cause was fixed for trial on motion of relator's counsel as soon as removed, on the order previously issued in the name of the State of Louisiana, to show cause why the writ should not be made peremptory. Our first appearance was to

answer this notice of trial. The objection to the jurisdiction was then made, and for further certainty the point reserved by bill of exception.

What has here been said upon any and all points presented, is not to be considered a discussion of their merits. We may be permitted to bear in mind that the questions are now undergoing review only, in connection with a motion to affirm, which is predicated on an assumption that the Record presents no issue worthy of serious consideration: nothing which is not recognized as determined and fixed in the jurisprudence of this court; nothing which saves the case from the convenient and irresponsible assertion that it is brought before this court on frivolous and trifling pretext, and manifestly for delay only.

No graver questions can be presented to courts of Justice than those which involve their jurisdiction—which define their power. The matter of dollars and cents involved in a cause, dwindles to insignificance in comparison to the questions which denies the authority of the Court. The one involves only a question enforcing the rights of A against B: the other makes law for the whole State. *Jurisdiction* taken against and beyond the law, is an usurpation repugnant to first principles of right; acts done by courts beyond their jurisdiction, are held as naught wherever *law* governs.

As expressed by Mr. Justice Miller, in the dissenting opinion in Railroad Co. vs. Mississippi: "It is always a matter "of delicacy when a cause of which a court has undoubted "jurisdiction is transferred at the instance of one party to "another court of concurrent jurisdiction. It is especially so "when the transfer is to be made to a Federal from a State "Court, without the consent of the latter, and against the "objection of the other party.

"In such a case, the right of removal should be made very "clear on the application for that purpose."

In the present case, if the motion to "affirm" can prevail, relator's right to remove his cause from the tribunal of his own selection to the Circuit Court of the United States, should be beyond the suspicion of a doubt. Far from that, we confidently believe, when, in due course of trial and inquiry, the nature and object of this suit is fully developed, this high and respected tribunal will hold that it should never have been permitted to go to trial in the Circuit Court.

It is, therefore, respectfully prayed that the motion to "affirm" be denied.

CHARLES F. BUCK, City Attorney,

For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

THE CITY OF NEW ORLEANS

vs.

THE STATE OF LOUISIANA ON THE RELATION OF HENRY SHEPHERD.

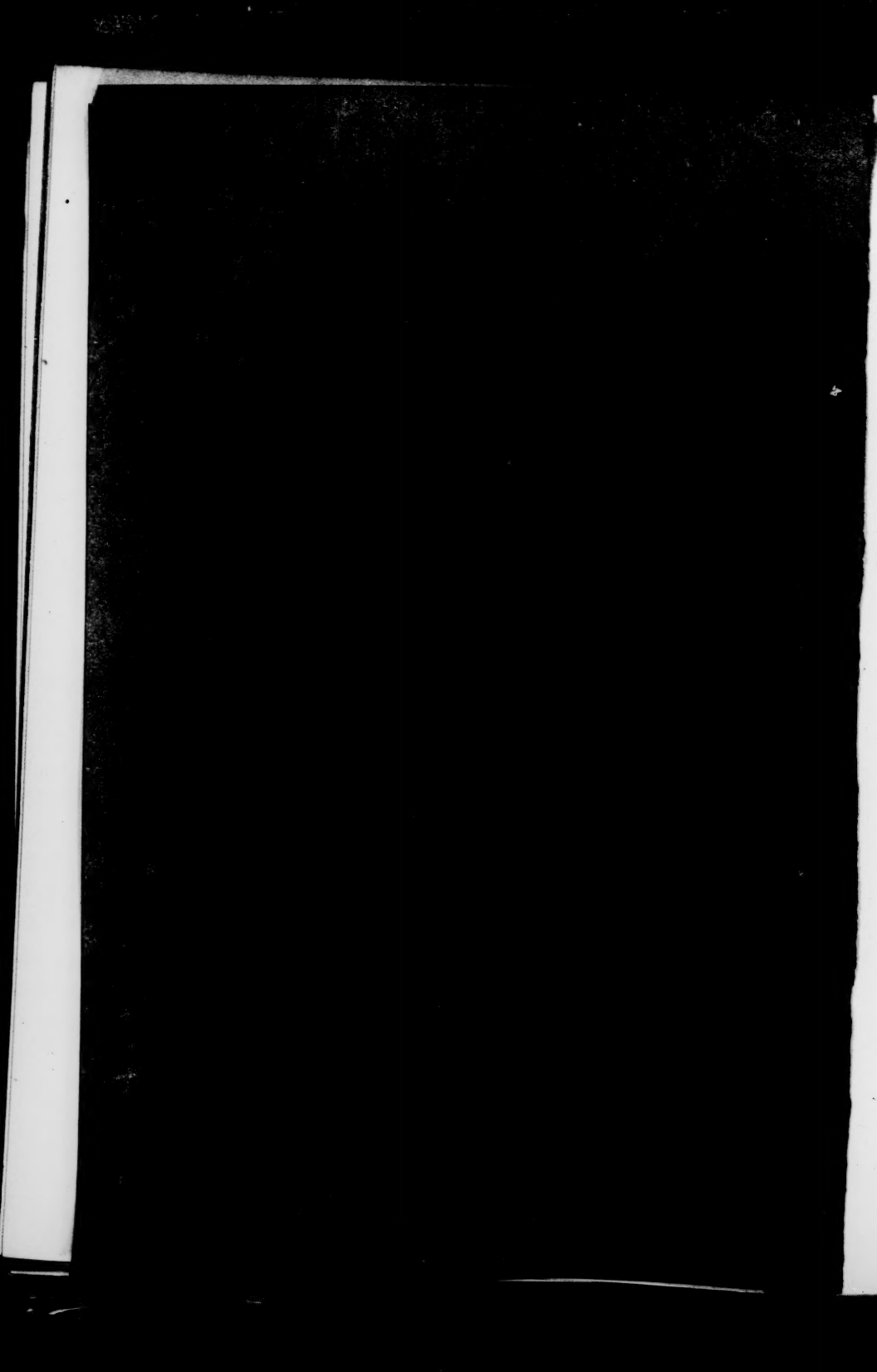
BRIEF OF DEFENDANT IN ERROR ON THE MOTION TO DISMISS AND AFFIRM.

T. J. SEMMES,

E. H. McCALEB,

Of Counsel for Defendant in Error.

A. W. Hyatt, Print, 73 Camp St. N. O.—24,788



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

THE CITY OF NEW ORLEANS.

versus

THE STATE OF LOUISIANA, ON THE RELATION OF HENRY SHEPHERD.

Now comes the State of Louisiana on the relation of Henry Shepherd, defendant in error in the above entitled cause, and through undersigned counsel, moves the court to dismiss the writ of error sued out in this cause, and in case said motion is refused, then the defendant in error to moves to affirm the judgment of the Circuit Court.

The grounds for the motion to dismiss are as follows:

1. The intervenors, whose intervention before trial was allowed *to be filed* by the Circuit Court, and whose intervention was dismissed by the judgment of the court, are not made parties to the writ of error.

2. The writ of error is sued out by the City of New Orleans alone, whereas the Mayor and Council of said city are parties to the judgment rendered by the Circuit Court, and are necessary parties to the writ of error.

3. The bond is given by the City of New Orleans alone, and not by the Mayor and Council of said city, who are parties to said judgment.

The following are the grounds for the motion to affirm:

1. The rights of all holders of the consolidated bonds issued by the City of New Orleans, under the provisions of the 37th section of the Act No. 71, of 1852, and the supplementary Act of the same year, No. 72, were expressly adjudicated and settled by this court in the case of Louisiana vs. Pilsbury, 105 U. S. p. 279, and, therefore, this writ of error is manifestly sued out for

delay. Indeed, in this case, the plaintiff in error pleads in the answer that the judgment of this court in said case is *res adjudicata*.

2. This suit was originally instituted in the State Court, and removed to the Circuit under the provisions of the Act of 1875, the relator, Shepherd, being a citizen of West Virginia; the right to remove a mandamus suit is well settled in the case of Mississippi vs. Railroad Co., 102 U. S. 137; Hartman vs. Greenhow, 102 U. S. 675; Washington Improvement Co. vs. Kansas R. R., 5 Dillon, 489.

3. It is well settled that as soon as the removal proceedings are perfected in the State Court, the jurisdiction of the Circuit Court of the United States attaches, and the question whether the Circuit Court will proceed with the cause when the record is filed therein, is not a question of jurisdiction, but a question of continuance or of discretion, not reviewable by this Court on writ of error.

This motion will be submitted to the Court under the rule on that subject, on Monday, 9th April, 1883, at 11 A. M.

THOS. J. SEMMES,
E. H. McCALEB,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

THE CITY OF NEW ORLEANS

vs.

THE STATE OF LOUISIANA ON THE RELATION OF HENRY SHEPHERD.

BRIEF OF DEFENDANT IN ERROR ON THE MOTION TO DISMISS AND AFFIRM.

1. All parties to the decree below must be made parties to the writ of error.

The Protector, 11 Wall. 87.

Moore vs. Simmonds, 100 U. S. 145.

Hampton vs. Rouse. 13 Wall. 188.

2. The Court will not permit an amendment where the record presents no question which has not been previously decided.

Pearson vs. Yewdall, 95 U. S. 294.

3. In the State practice, intervening parties must be made parties to the appeal or it will be dismissed.

Kellogg vs. Clark. 15 La. 362.

Swearingen vs. McDaniel, 12 R. 203.

In the case of State ex rel. Southern Bank vs. Pillsbury, 31 La. A. p. 9, the Court held that tax-payers and others having an interest might intervene in a mandamus suit to compel the city to levy taxes to pay the consolidated bonds. This case of Pillsbury was decided in this Court at the last term, and is reported in 105 U. S., p. 278.

That an intervenor is entitled to appeal when his intervention has been filed by leave of the Court, has been decided in Ex parte Cutting, 94 U. S. 20; Ex parte Jordan, 94 U. S. 248.

4 The only parties to the writ of error in this case are the

City of New Orleans, plaintiff in error, and the State ex rel. Henry Shepherd, the defendant in error. The City of New Orleans only has given bond. The Mayor and Council who are parties to the judgment and who were ordered to levy the tax, are not parties to the writ of error, nor have they signed the bond, nor does the bond purport to be the bond of the Mayor and Council.

The Code of Practice, Art. 844, provides as follows:

"When the mandate directing the performance of a specified "act shall have issued against a corporation, the notice shall be "served on the mayor or presiding officer of such corporation, "and if the corporation or the body of the directors disobey the "order, it shall be punished for contempt by the sequestration "of its revenues [writ of distringas] until it yield obedience to "the mandate of the court."

This is in conformity to the common law practice, as explained in High on Extraordinary Legal Remedies, section 517, where it is said that "in the case of Municipal corporations the "practice was early established of delivering the writ to the "Mayor, as being the visible part of the corporation." For this he cites Inser vs. Chapman, 6 Mod. R. 152; King vs. Mayor of Exeter, 12 Mod R. 251; State vs. Jones, 1 Ird. 129.

Although the service of notice is made on the Mayor, the mandate goes against the Mayor and the members of the Council, indiyidually, who are punishable for contempt, in case of refusal to comply with the order of the court.

ON THE MOTION TO AFFIRM.

There is no unsettled question involved in this case

The right of the relator to the tax is expressly decided in the Pillsbury case, 105 U. S. The judgment in that case has been pleaded as *res judicata* in this, although the city is now resisting its enforcement in the State court.

The curious ground is taken that the judgment rendered in that case, by which the city is ordered to levy the amount of tax

demanded in this suit, is a bar to the prosecution of this suit, although that judgment procured at the instance of another creditor remains unexecuted, and its execution is being resisted by the city. It is tantamount to saying: I am ordered already to do what you require. I have refused to comply with the order, and therefore the court should not exact compliance.

This suit was originally instituted in the State Court on 14th December, 1882.

The alternative writ on the Mayor and Council of New Orleans, was made returnable by the Judge of the State Court, on 22d December. On 15th December proceedings and bond for removal to the United States Circuit Court, were filed; and, on 16th December, the record was filed in the said Circuit Court. On the same day a motion was made in the Circuit Court, suggesting that, prior to the removal, the alternative writ had been made returnable on 22d December, and, thereupon, the court ordered that the defendant be notified that the record from the State Court had been filed, and that the hearing of the rule *nisi* issued by the State Court, would be had at 11 A. M., on the 22d December, the day fixed by the State Court.

On the return day the defendant objected to going into the trial of the rule *nisi*, and demanded postponement of it until the next term of the Circuit Court, to wit: the fourth Monday of April.

It was urged that the court was not seized of jurisdiction of the case until the next term of the court.

The exception as to jurisdiction was overruled, and the motion to postpone the trial was denied.

The ruling on the latter point is not subject to review, 6 How. 1; 20 How. 523. This court has settled the question that the Federal Court has jurisdiction of a removed cause the moment the State Court loses it; the State Court can proceed no further when the removal papers are filed.